(7)

{SHOW } PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-00867 CFX
SHORT TITLE Consol. Rail Corp. DOCKETED: Nov 26 1984
VERSUS Ahnapee & Western, et al.

Date	Proceedings and Orders
Nov 26 1984	Petition for writ of certiorari filed.
Dec 7 1984	Order further extending time for non-government respondents to file a consolidated response to the
Dec 7 1984	petitions for writs of certiorari is further extended to and including thirty days from receipt by respondents
Dec 7 1984	of the Solicitor General's brief for the United States
Dec 20 1984	Order extending time to file response to petition until January 25, 1985.
Dec 24 1984	Order extending time to file response to petition until January 28, 1985.
Dec 24 1984	Above extension for the Solicitor General.
Jan 30 1985	Brief of United States in support of the petitions and consolidation of the cases filed. VIDED.
Feb 21 1985	Order further extending time to file response to petition until March 21, 1985.

CONTINUE {

{SHOW } PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-00867 CFX
SHORT TITLE Consol. Rail Corp. DOCKETED: Nov 26 1984
VERSUS Ahnapee & Western, et al.

Date	Proceedings and Orders
Feb 21 1985	Above extension is for private respondents.
Feb 25 1985	Waiver of right of respondent Southern Traffic League, Inc. to respond filed.
Feb 25 1985	Waiver of right of respondent Eastern Industrial Traffic League, Inc. to respond filed.
Mar 8 1985	Brief of Canadian Railroads in opposition filed. VIDED.
Mar 21 1985	Brief of respondent Itel Rail Corp., et al. in opposition filed. VIDED.
Mar 21 1985	Waiver of right of respondent Patrick W. Simmons to respond filed.
Mar 27 1985	DISTRIBUTED. April 12, 1985
Apr 5 1985	Reply brief of petitioner Consolidated Rail Corp. filed.
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-00867 CFX
SHORT TITLE Consol. Rail Corp. DOCKETED: Nov 26 1984
VERSUS Ahnapee & Western, et al.

Date	Proceedings and Orders
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Rehnquist joins. (Detached opinion.) Justice O'Connor OUT.

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84-867

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Interstate Commerce Act defines the national transportation policy and requires the Interstate Commerce Commission to deregulate the railroad industry by exempting railroads from regulatory provisions that are not necessary to carry out that policy. The questions presented are:

1. Did the court of appeals err in invalidating the Commission's exemption of joint rates for movements involving connecting railroads, by reading into the national transportation policy a vague requirement—not contained in the Act or its prior construction by the agency—that the division of joint rate profits between railroads be "fair"?

2. Did the court of appeals err in holding that the agency's authority to grant exemptions from unnecessary regulation cannot be invoked if the relative bargaining positions of parties due to "statutory entitlements" under the existing regulatory scheme would be affected by a partial exemption.

PARTIES TO THE PROCEEDING

Petitioners In The Court Of Appeals

Ahnapee and Western Railway Company
Aluminum Association, Inc.
American Paper Institute, Inc.
Atlantic and Western Railway Company
Bangor and Aroostook Railroad Company
Bessemer and Lake Erie Railroad Company
Board of Trade of the City of Chicago
Brae Corporation
Canadian National Railway Company
Canadian Pacific Limited
Central Vermont Railway, Inc.
Chattahachee Industrial Railroad
Continental Forest Industries, Inc.
Delaware and Hudson Railway Company
Detroit, Toledo and Ironton Railroad Company
Elgin, Joliet and Eastern Railway Company
Evans Products Company
Ford Motor Company
Graham County Railroad, Inc.
Grand Trunk Western Railroad Company
Great Southern Paper
Green Bay and Western Railroad Company
Hartford & Slocomb Railroad Company
Illinois Central Gulf Railroad Company
International Paper Company
Itel Rail Corporation
Kansas City Southern Railway Company
LaMoille Valley Railroad Company
Leaf River Forest Products, Inc.
Maine Central Railroad Company
McCloud River Railroad Company
The Mississippian Railway, Inc.
Missouri-Kansas-Texas Railroad Company
National Industrial Transportation League
National Railway Utilization Corporation
Old Augusta Railroad Company
Peninsula Terminal Company
Pickens Railroad Company
Port of Oakland
Rubber Manufacturers Association
Sandersville Railroad Company

Sea-Land Freight Service, Inc.
Sea-Land Service, Inc.
Patrick W. Simmons
Soo Line Railroad Company
H.C. Spinks Clay Company, Inc.
SYSCO Corporation

Intervenor-Petitioners In The Court Of Appeals

Alabama State Docks
American Short Line Railroad Association
American Trucking Associations, Inc.
Angelina and Neches River Railroad
Apache Railway Company
Apalachicola Northern Railroad Company
Arcata and Mad River Railroad Company
Atlanta & Saint Andrews Bay Railway Company
Brick Association of North Carolina
Brick Association of South Carolina
Brick Institute of America Region Nine
Brillion & Forest Junction Railroad Company
Brown Transport, Inc.
Cadiz Railroad Company
Canadian Pulp & Paper Association
Clarendon and Pittsford Railway Company
Columbia & Cowlitz Railway Company
Corinth and Counce Railroad Company
DBA Sierra Railroad Company
DeQueen & Eastern Railroad Company
East Camden & Highland Railroad Company
Eastern Industrial Traffic League, Inc.
E.I. Hutton Credit Corporation
Escanaba & Lake Superior Railroad Company
Funding Systems Railcar, Inc.
Greenville and Northern Railway Company
Interstate Carriers Conference, Inc.
Little Rock & Western Railway Corporation
Marinette, Tomahawk and Western Railroad Company
Meridian & Bigbee Railroad Company
Mississippi & Skuna Valley Railroad Company
Mississippi-Louisiana Brick & Tile Manufacturers Association
National Grain and Feed Association
Oregon, California & Eastern Railway Company
Pittsburgh & Lake Erie Railroad Company

Rahway Valley Railroad
Regular Common Carrier Conference, Inc.
Sabine River and Northern Railroad Company
Seattle & North Coast Railroad Company
Silver Foot Inc.
Southern Traffic League, Inc.
Southwest Forest Industries, Inc.
Terminal Railway
Texas Mexican Railway Company
Texas, Oklahoma & Eastern Railroad Company
Totem Ocean Trailer Express, Inc.
Upper Mexican and Plymouth Railroad Company
Valdosta Southern Railroad Company
Vermont Railway, Inc.
Weyerhaeuser Company
Wisconsin and Southern Railroad Company

Respondents In The Court Of Appeals

Interstate Commerce Commission
United States of America

Intervenor-Respondents In The Court Of Appeals

Burlington Northern Railway Company
Southern Pacific Transportation Company
Consolidated Rail Corporation*

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*Petitioner Consolidated Rail Corporation has no parent company. Its subsidiaries and affiliates are as follows:

Subsidiaries

Buffalo Creek Railroad Co.
Calumet Western Railway Co.
Canada Southern Railway Co.
Consolidated Equity Corp.
Detroit River Tunnel Co.
Indiana Harbor Belt Railroad Co.
Jersey Central Transportation Co.
Merchants Despatch Transportation Co.
Niagara River Bridge Co.
Penn Central Communications Co.
Pennsylvania Truck Lines, Inc.
Philadelphia, Reading & Pottsville Telegraph Co.
Relco-PA Inc.
St. Lawrence & Adirondack Railway Co.

Affiliates

Akron & Barberton Belt Railroad Co.
Albany Port Railroad Corp.
Belt Railway Co. of Chicago
Chicago & Western Indiana Railway Co.
Fruit Growers Express Co.
Lake Erie & Eastern Railroad Co.
Lakefront Dock & Railroad Terminal Co.
Monongahela Railway Co.
Nicholas, Fayette & Greenbrier Railroad Co.
Peoria & Pekin Union Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Co.
Terminal Railroad Association of St. Louis, Inc.
Toledo Terminal Railroad Co.
Trailer Train Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ____

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The pertinent opinions of the Interstate Commerce Commission (Pet. Apps. D, E and F, 103a-52a, 153a-89a, 191a-217a)[1] are reported at 367 I.C.C. 423 and 745. The opinion of the court of appeals (Pet. App. A, 1a-95a) is reported at 740 F.2d 1023. The orders of the court of appeals amending its opinion, responding to petitioner's motion for clarification, and denying the petitions for rehearing and suggestions for rehearing en banc (Pet. App. C, 96a-101a), are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1984 (Pet. App. H, 218a). A timely petition for rehearing and

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[1] "Pet. App." refer to the appendix to the petition for a writ of certiorari to review the decision below filed by the Interstate Commerce Commission on October 4, 1984, in No. 84-550.

suggestion for rehearing en banc was denied on August 27, 1984 (Pet. App. C, 96a), and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

The relevant statutory provisions of the Interstate Commerce Act, as amended by the Staggers Rail Act of 1980, are 49 U.S.C. §§ 10101a, 10321(a), 10505, and 11122, which provide as follows:

> § 10101a. In regulating the railroad industry, it is the policy of the United States Government—
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10321. (a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

* * *

§ 10505. (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 11122. (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive,

freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

STATEMENT OF THE CASE

In the Staggers Rail Act of 1980 Congress extensively amended the Interstate Commerce Act ("ICA") to reduce excessive regulation of railroads. Congress found that the rationale for enactment of the ICA—the need to protect shippers from the abuse of railroad market power—no longer existed in most areas because improvements in other modes of transportation had rendered "most transportation within the United States * * * competitive."[2] Regulation was impeding railroad efforts to regain financial health and remain viable in the private sector. Thus, as a "cornerstone" of the Act, Congress broadened the authority of the Interstate Commerce Commission ("ICC") to grant exemptions from regulation.[3] For regulatory matters affecting railroads, Congress set forth a 15-point national transportation policy ("NTP") in section 10101a of the ICA (pp. 2-3, *supra*), and *required* the ICC to grant an exemption wherever it found that continued regulation was not necessary to carry out the NTP or to protect

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[2] Staggers Rail Act, Pub. L. No. 96-448, § 2, 84 Stat. 1895 (1980); *see* 49 U.S.C. § 10101a (historical note).

[3] *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 79 (1980).

shippers from the abuse of market power. 49 U.S.C. § 10505.[4] Section 10505 also authorized the ICC to revoke or modify an exemption if necessary to carry out the NTP. 49 U.S.C. § 10505(d).

The hallmark of competitive markets is the ability of competitors to set and change their own prices for their services. However, prior to the Staggers Act, a railroad wishing to cancel a "joint rate"[5] without the concurrence of the other carriers participating in the rate (in order, for example, to permit negotiation of a new joint rate or application of another form of rate to a multi-carrier movement) was required by the ICA to obtain ICC approval, a costly and time-consuming process. 49 U.S.C. § 10705(e). This requirement was part of a comprehensive scheme of administered prices which encouraged collective rate setting free of antitrust sanctions and equalized rates for all routes to discourage price competition.

---

[4] Section 10505(a) (p. 3, *supra*) provides in relevant part that the ICC "shall exempt" a person, transaction or service if it finds that a provision of the ICA

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
>
> * * *

[5] Joint rates are one type of rate which may apply to a through route (which the ICA requires railroads to maintain (49 U.S.C. § 10703(a)(1)), *i.e.*, a route which involves the participation of more than one railroad. Joint rates specify a single charge which a shipper must pay for a through movement. The participating carriers' respective shares or "divisions" of the revenue produced by the joint rate are fixed apart from the level of the rate. Most joint rates were set when carriers enjoyed antitrust immunity (abrogated by the Staggers Act) to set rates collectively, and were required by the ICC to be equal over competing routes regardless of the relative efficiency of the routes. If joint rates are cancelled, other types of rates continue to apply on through movements. The only difference is that each carrier is free to set its charge for its portion of a through movement, thus assuring that cancellation of joint rates does not "close" (i.e., preclude the use of) the affected through routes.

In passing the Staggers Act, Congress recognized that such regulation had led to severe problems of "too low rate divisions and a proliferation of uneconomic routes,"[6] and it enacted new provisions to expedite and simplify the approval process. *See* 49 U.S.C. § 10705a.[7]

However, Congress recognized that these new provisions would not completely solve the problem, as they still limit a railroad's freedom to change the rates for its portion of a through route in which it participates, without the concurrence of all participating carriers. It therefore directed the ICC to use the exemption power so that "as many as possible of the Commission's restrictions on changes in prices * * * will be removed * * *" (H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (conference report), and, more specifically, "to use the exemption authority to abolish joint rates, if such an action appears desirable * * *." 126 Cong. Rec. 28430 (1980) (remarks of Rep. Madigan, a sponsor and conferee, explaining the Conference Report).

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[6] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 111 (1980) (conference report).

[7] Prior to the Staggers Act, under 49 U.S.C. § 10705(e) a railroad could independently alter an established joint rate or division or set a price for its portion of a through movement only by obtaining the concurrence of all participating carriers (which was often not forthcoming) or by initiating a time-consuming regulatory proceeding in which the carrier proposing cancellation or alteration of a joint rate or division was required to prove that its proposed action was in the "public interest." Section 10705(e) requires consideration of comparative distances, transit times, and energy consumption on different routes, and the overall impact of a cancellation on the shippers and carriers affected by it. These restrictions in some instances were anticompetitive and imposed serious burdens on carriers seeking the price flexibility required to succeed in competitive markets. Congress sought to ease these burdens by adding 49 U.S.C. § 10705a, an alternative procedure under which a carrier can unilaterally cancel or surcharge any joint rate to ensure that the carrier receives revenue from a through movement that is at least equal to 110% of the variable costs incurred in the movement. Cancellation of joint rates which yield revenues above this marginally profitable level continue to be subject to the public interest test of section 10705(e).

ICC regulations also govern the terms under which railroads interchange boxcars, as required by the ICA. 49 U.S.C. § 10742. Pursuant to 49 U.S.C. § 11122 (pp. 4-5, *supra*) the ICC had established a system of "car hire" regulation under which a carrier owning a boxcar is compensated by other carriers when the car is on their lines, whether loaded or empty. The rules, which specified the level of car rental regardless of demand for the car,[8] and prohibited other charges, resulted in excessive investment in boxcars, needless movement of empty boxcars and costly inefficiencies, at a cost of hundreds of millions of dollars annually.

The ICC invited comments on a request by petitioner Consolidated Rail Corporation ("Conrail") to eliminate impediments to boxcar competition by exempting boxcar traffic from all forms of regulation (Pet. App. 123a-24a). Boxcar traffic is substantial, accounting for about $800 million in revenues for Conrail alone in 1983 (one fourth of its total revenues), but for Conrail and the rest of the industry, boxcar traffic had declined in volume by half from 1977 to 1982 (Ct. App. Jt. App. 2029),[9] in the face of intense truck competition.

After considering comments on the proposed exemption as to rates, including those from lessors of railroad cars and Class III (short line) railroads,[10] who argued that large railroads

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[8] These rental payments are composed of time ("per diem") and mileage payments. Prior to the exemption, a railroad was compelled to pay car hire whenever another railroad's boxcar was on its lines even if the car was empty and in storage (with the consent of the owner), and even when a carrier was required to return empty cars to the owner free of charge. Some of the costly and inefficient aspects of the car hire rules are summarized in the court of appeals' decision (Pet. App. 51a). Perversely, as the court noted, car hire fees increase when demand for the car decreases (Pet. App. 51a).

[9] "Ct. App. Jt. App." refers to the joint appendix filed in the court of appeals.

[10] Class III railroads are those with less than $10 million in annual operating revenue. *See* 49 C.F.R. § 1201 1-1 (1983). Many Class III railroads are owned by shippers or have relationships with owners and lessors of boxcars by which short lines are provided free use of the cars and the owner/lessor's investment in the cars is tax sheltered (Pet. App. 133a, 166a-67a, 178a).

might cancel through routes with short-line railroads, the ICC granted the exemption. The ICC found that regulation of maximum rates or joint rates for boxcar traffic was not necessary to carry out the NTP or to protect shippers from abuse of market power (Pet. App. 106a-127a). Because of pervasive truck competition for such traffic, the ICC found that rail carriers do not possess market power (Pet. App. 114a-22a). The ICC also noted that through the antitrust laws and revocation of the exemption, other remedies were available for any abuse of market power that might exist (Pet. App. 108a, 121a, 22a, 126a, 136a, 138a, 181a, 196a). The ICC also found that a rational rail carrier had economic incentives for maintaining efficient through routes (Pet. App. 123a-24a, 161a-62a). Accordingly, the ICC found that continued regulation of boxcar rates was not necessary to serve the NTP (Pet. App. 126a-27a).

Confronted with a record of staggeringly expensive and inefficient empty boxcar movements (see Pet. App. 51a),[11] the ICC found that its car hire rules under section 11122 promoted overinvestment in and underutilization of boxcars. By assuring car owners full recovery of their ownership costs regardless of the demand for or the efficiency of boxcar use, the rules burden railroads with economically unwarranted costs—especially "destination" carriers like Conrail which deliver much more boxcar traffic to destinations on their lines than they originate. To permit a greater role for market forces to affect the level of car rental charges and, consequently, of boxcar rates, and to reduce the costly inefficiencies of the pre-existing scheme, the ICC granted Conrail's request for a partial exemption of boxcars from the car hire rules.[12]

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[11] The record contains an estimate that the exemption could reduce empty car miles by nearly one third (1.1 billion car miles) resulting in a savings of at least $330 million annually (Ct. App. Jt. App. 1202-03).

[12] Conrail had modified its request after comments expressed opposition to complete exemption.

Thus, the ICC (1) made the findings required by section 10505(a), (2) completely exempted carriers from the car hire rules with respect to bilateral agreements governing car hire rates, empty movements, and storage,[13] and (3) granted a partial exemption from the other car hire rules, thereby affording destination carriers some of the freedom they would have in a fully deregulated market to charge a car owner for storing or returning its empty car if unable to negotiate bilateral agreements, and thus to assure that those railroads responsible for imposing the costs of moving empty cars could no longer avoid paying them.[14] The ICC reasoned that by allowing costs to be borne by those creating them, more efficient use of cars and reduced costs would result, and carriers that had not had such incentives before would now have incentives to negotiate agreements to improve boxcar utilization. (Pet. App. 127a-34a; 163a-83a; 198a-200a).

The ICC noted that it could achieve the resulting changes in the car hire rules through either its exemption authority under section 10505 or its affirmative regulation authority under section 11122 (Pet. App. 136a), but it ultimately relied only upon the former (Pet. App. 166a-67a). In response to objections that even this partial exemption would have substantial effects on some parties and was beyond the scope of section 10505, the ICC observed that "[e]very exemption necessarily affects the fortunes of those businesses which were benefitted by regulation" (Pet. App. 178a), and that "Congress surely did not intend to create a legal framework in which reasonable

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[13] Prior to the exemption the ICC had granted limited temporary authority for carriers to enter into bilateral agreements for car hire rental below the prescribed rate. Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroad Per Diem Levels*, 364 I.C.C. 291 (1980).

[14] Thus, the ICC allowed destination railroads to cease paying car hire for empty boxcars stored on their lines with the owner's consent, and permitted such railroads to assess a charge of up to 35 cents per mile (a level at or below the variable cost of moving an empty boxcar) when an owner demands that its boxcar be returned empty (Pet. App. 165a).

intermediate phases [short of complete exemption] are forbidden" (Pet. App. 168a).

Reflecting the highly complex and technical nature of the subject matter, the ICC explained its findings that the exemptions were required under section 10505 in a series of four decisions addressing at length the rationale for and comments made on the proposed exemption (*see* Pet. App. 103a, 153a, 190a).[15]

Judicial review of the ICC's decision was sought by shippers, primarily challenging the exemption from regulation of overall rate levels, and by railroads, primarily challenging the exemption from regulation of joint rates and the car hire rules.[16] The court of appeals upheld the ICC's decision that competition, which made monopoly profits impossible, had rendered maximum rate regulation for boxcar traffic unnecessary (Pet. App. 20a-21a). However, the court vacated the ICC's decision that regulation of joint rate changes and divisions is unnecessary to carry out the NTP (Pet. App. 37a-50a). The court vacated the car hire exemption on the ground that it was not an exemption but affirmative substantive regulation (Pet. App. 50a-69a).

The court set aside joint rate exemption even though, in upholding the ICC's exemption of boxcar movements from maximum rate regulation, it had sustained the ICC's finding that, because of pervasive truck competition for such traffic, rail carriers do not possess market power that might be abused to the detriment of shippers (Pet. App. 27a), and had, like the ICC, noted that other remedies for any actual abuse of market

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[15] The ICC's decision became effective on January 1, 1984, except that with respect to cars owned or leased by small railroads the effective date of the car hire exemption was twice deferred (Pet. App. 184a-85a). By decision dated June 26, 1984, the ICC indicated its continued willingness to consider constructive proposals for alternative approaches to its limited exemption; in all other respects the ICC (and the court below) denied stays (*e.g.*, Pet. App. 190a-214a).

[16] The ICC's action was supported in the court below by the United States (*cf.* Pet. App. 126a).

power were available through the antitrust laws or the ICC's revocation of the exemption (Pet. App. 34a), remedies that are also available with respect to cancellation or division of joint rates.

The ICC had also found that, in view of the impossibility of monopoly profits, the economic incentives of a rational carrier to maintain efficient joint routes (and the availability of remedies for dealing with any abuses), justified the findings specified by section 10505(a). This meant that the ICC was required to exempt from regulation joint rate changes and divisions and the closing of through routes (Pet. App. 123a-24a).

Nonetheless, the court of appeals set aside the ICC's finding that the regulation of joint rates was not necessary to carry out the NTP. Adopting an interpretation of the ICA that had not been urged by any party before the ICC or in the briefs on appeal, the court held that the NTP requires a "fair" division of profits produced by joint movements, one which not only provides a compensatory return to each participating carrier but assures each of the share of any additional profits (i.e., monopoly profits or "rents") that it "deserves." The court concluded that the ICC had failed to consider this policy concerning "unfair divisions" of profits, which is not set forth in any provision of the ICA (Pet. App. 44a-50a). The court did not reconcile its concern about division of monopoly profits with its earlier finding that monopoly profits are not expected to arise as a result of the exemption (Pet. App. 20a-34a).

The court of appeals set aside the exemption as to car hire on the ground that it did not constitute an exemption because it affected the "relative bargaining positions" of parties and their "statutory entitlements" under the pre-existing regulatory scheme. The court acknowledged that Congress empowered the ICC to adopt either "complete" or "partial" exemptions (Pet. App. 56a-57a, quoting H.R. Rep. No. 1430, *supra*, at 105), and that it could wholly exempt compliance with section 11122 and the ICC's car hire rules thereunder (Pet. App. 69a). However, the court rejected the partial car hire exemption as an improper use of the exemption authority (Pet. App. 57a-

66a), since it did not wholly eliminate existing "statutory entitlements" but, by permitting carriers to take previously impermissible actions within specified limits, created new entitlements. The court saw this as a "policy choice" that altered the "relative bargaining positions" of car owners and users without relying exclusively on market forces (Pet. App. 60a-65a). According to the court, therefore, the partial exemption constituted affirmative "substantive regulation" rather than "deregulation" and could not be achieved through an exemption but only, if at all, by regulation pursuant to section 11122, on which the ICC did not rely. (Pet. App. 54a-69a).

REASONS FOR GRANTING THE WRIT

A.

The questions presented raise the important issue of whether the ICC will continued to have the ability to implement Congress' mandate to deregulate the rail transportation industry by freeing it from burdens and limitations imposed as much as 90 years ago and no longer justified. *Cf.*, *e.g.*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 382 (1974). In the Staggers Rail Act of 1980, Congress sought to accelerate the pace of deregulation it had begun a few years earlier.[17] In addition to amending the ICA to eliminate directly some unneeded regulatory constraints,[18] the Staggers Act required the ICC to deregulate further by seeking out and granting exemptions whenever it can make the findings specified in section 10505(a).

In two respects the court of appeals' decision will defeat Congress' clear intention by significantly curtailing the ICC's ability to exercise its important exemption authority:

(1) The decision below injects into the NTP, the principal standard under which the ICC's duty to grant an exemption is determined, an unprecedented and vague element that will be

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[17] *See* Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[18] *See* H.R. Rep. No. 1430, *supra*, at 80-83.

a factor not only in exemption proceedings but in any other proceeding requiring consideration of the NTP,[19] and that is inconsistent with the basic deregulatory purpose of the Staggers Act.

(2) Based on free-wheeling and unconventional second-guessing of the ICC's economic analysis, the decision below imposes unfounded and novel limitations on the ICC's ability to exercise its broad exemption authority, thereby perpetuating needless and costly regulation.

In the instant case, these rulings will have a substantial impact in that they will surely delay, and may make it impossible to achieve, the benefits of the boxcar exemption. As noted, the ICC's car hire rules alone impose on financially strapped railroads hundreds of millions of dollars in needless costs every year. The decision below also has substantial importance beyond this proceeding. The court's ruling as to joint rates will affect every proceeding requiring consideration of the NTP, while the ruling as to car hire will limit the ICC's authority as to every exemption proceeding.[20]

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[19] Other provisions of the ICA expressly require the ICC to apply the NTP. *E.g.*, 49 U.S.C. §§ 10702(b), 10704(d), 10706(a)(2), 10707a(d)(2)(B)(iii), 10712, 10761, 10762(f), 10922(b)(2)(A), (i)(2). Indeed, the ICC is obliged to consider the NTP in all actions it takes. *See, e.g.*, 49 U.S.C. § 10101(b); *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 87-88 (1957).

[20] The questions presented are ripe for review. The court's ruling as to joint rates requires the ICC to engage in further consideration of a complex issue that was not the subject of comments in the prior proceedings, an undertaking which would be entirely unnecessary if the court of appeals has erred in construing the deregulatory Staggers Act to require consideration of the "fairness" of divisions of profits on joint rates. In addition, the court directed that any interim rules the ICC issues must address this perceived problem (Pet. App. 93a). As to the car hire issue, the court's ruling leaves the ICC no room through further consideration in the exemption proceeding to achieve the result it seeks. The ICC's only apparent option is to institute a rulemaking proceeding under section 11122, and the court left open the question whether the ICC could achieve the desired result even through that avenue (Pet. App. 69a).

B.

The court's decision conflicts with decisions of this Court and other courts of appeals on important questions of administrative law and the proper scope of judicial review (see pp. 16 n.22, 20, 22-23, *infra*). Even in the absence of a conflict, however, the decision below would warrant review because all rules, regulations and final orders of the ICC may be brought to the court below for judicial review (28 U.S.C. §§ 2342(5), 2343), and the ICC may have no practical choice but to treat the decision below as definitive with respect to the requirements of the NTP and the scope of its authority to grant exemptions. *Cf. United States* v. *Mendoza*, 104 S. Ct. 568, 573 (1984) (preclusive effect of court of appeals decision may justify certiorari).

C.

The court's rulings on the questions presented are erroneous.

1.

The joint rate exemption was required by the ICC's finding that continued joint rate regulation was not necessary to carry out the NTP and was not needed to protect shippers against abuses of market power (Pet. App. 123a-29a). Reiterating a conclusion it had reached in other recent proceedings,[21] the ICC determined that, even though carriers would be free to cancel joint rates, there was little likelihood "that a carrier acting in an economically rational manner would close efficient routings * * *" (Pet. App. 124a).[22] In addition, with respect to

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[21] *See, e.g.*, Pet. App. 161a, 199a-200a; Ex Parte No. 445, *Standards for Intramodal Rail Competition*, 48 Fed. Reg. 31672, 31674 (July 11, 1983); *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *rev'd on other grounds sub nom. Detroit, T. & I. R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984).

[22] Although not setting aside the exemption with respect to through routes (*see* Pet. App. 50a, 92a), the court took issue with this conclusion as well, dismissing it as a "bald assertion" that contradicted an "admission" by the ICC "that large carriers have an incentive to close off efficient competing

the entire exemption, the ICC noted that it would continue to monitor carrier actions and would modify or revoke the exemption if warranted (Pet. App. 121a, 136a, 138a, 181a, 196a).[23] As

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routes to gain monopoly power over a haul from a given origin to a given destination" (Pet. App. 42a-43a). As the court elsewhere noted, however, the ICC had fully explained its rationale for this conclusion (Pet. App. 39a-41a, 45a, 46a). That rationale has been endorsed in other cases with which the decision below is therefore in conflict. *E.g.*, *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 377 (6th Cir. 1983) (Posner, J.) (closing efficient through routes would be "commercial suicide"); *Central Vt. Ry.* v. *ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983). The asserted "admission" was based on the ICC's statement that "route closings *might* occur *if* a carrier wishes to close routes that involve long hauls over the lines of connecting railroads in order to concentrate the traffic in routes that involve hauls over its own lines" (Pet. App. 124a; emphasis added). However, the ICC did not mention or make any admission about large carriers closing efficient routes or gaining monopoly power. In context it is clear that the ICC's statement meant that *any* carrier has powerful incentives to route traffic over its efficient single line routes rather than over inefficient joint line routes or, conversely, over efficient joint line routes rather than inefficient single line routes, not to gain monopoly power (an objective which is virtually always foreclosed by competition from trucks) but to be more competitive and ultimately more profitable. The court further suggested that the ICC's analysis of the relationship between larger railroads and Class III railroads focussed only on the "short run" (Pet. App. 48a). However, the ICC's finding that large carriers benefit from joint movements with efficient Class III railroads was not limited to the short run, nor was its finding that Class III carriers have significant strength to bargain with large carriers and that large carriers have substantial economic incentives to see that smaller connecting carriers operate efficiently and obtain a healthy return (Pet. App. 161a-62a, 174a-80a, 183a, 198a-99a).

[23] In addressing joint rates the court evidently overlooked the ICC's reliance on post-exemption monitoring and revocation, for it suggested that the ICC was relying "mere[ly]" upon the existence of antitrust remedies as providing post-exemption protection (Pet. App. 43a, 44a). However, in another portion of its opinion (see Pet. App. 15a n.*), the court recognized that Congress " 'expected[ed] * * * that the Commission will adopt a policy [once an exemption has been granted] of reviewing carrier actions after the fact to correct abuses of market power' " (Pet. App. 34a, quoting from H.R. Rep. No. 1430, *supra*, at 105), and based its decision to affirm the ICC's exemption of boxcars from maximum rate regulation in part on the ICC's statement that it would follow that policy. This possibility of revocation has

contemplated by Congress,[24] the ICC also took account of the availability of antitrust remedies to prevent or cure anticompetitive problems arising under the exemption (Pet. App. 108a, 122a, 126a).[25]

In finding the ICC's rationale inadequate the court below held (1) that the NTP requires a "fair" division of profits from joint movements and (2) that the ICC had failed expressly to consider this previously unrecognized requirement (Pet. App. 50a). In the court's view, the profits from joint operations must be "fairly" apportioned between large and small participating carriers, particularly so-called "captive" carriers that connect only with larger carriers. Even if the divisions were fully compensatory, and provided each participant with enough revenue to stay in business (*i.e.*, a reasonable return adequate to attract and retain private capital), the court asserted that it would be "unfair" if a larger carrier could gain a "disproportionate" return or share of additional profits relative to a smaller carrier (Pet. App. 45a-49a & n.1).[26]

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been held to provide railroads with "a strong incentive" not to abuse any market power they may have. *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981).

[24] H.R. Rep. No. 1430, *supra*, at 83, 105.

[25] In its original opinion, the court stated that the ICC had "nowhere mentioned antitrust remedies" as post-exemption protection against feared abuses (Pet. App. 43a). In the face of rehearing petitions noting this and other errors, the court amended its opinion to acknowledge that the ICC had already mentioned the antitrust laws as remedies for predatory pricing by large railroads against small railroads, but the court stated that the ICC had not specifically referred again to such remedies with particular respect to "co-participation in joint rates or through routes" (Pet. App. 95a). On that basis the court rejected reliance upon antitrust remedies as a "post hoc rationalization of agency counsel" (Pet. App. 43a, *citing Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983)). In so ruling, the court of appeals erroneously applied that doctrine.

[26] The court focussed its attention on the issue of how the railroads participating in a joint rate would divide monopoly profits (Pet. App. 44a-45a n.1), the occurrence of which to any significant degree is precluded by the ICC's finding—upheld by the court below—that railroads lack the market power

A fundamental error in the court's analysis is that this vague and unprecedented regulatory policy is nowhere set forth in the 15-point NTP[27] referred to in section 10505, which embodies the only criteria in the ICA against which the ICC's boxcar exemption must or may be assessed.[28] While the court referred to several of the 15 elements of the NTP expressly set forth in section 10101a, all of which the ICC had directly addressed (Pet. App. 122a-23a, 126a), the court did not and could not state that any of those elements by its terms addressed "unfair" divisions or profits (Pet. App. 45a-49a).[29] Indeed, the court

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required to earn monopoly profits. Presumably the court's reference to large carriers having "monopoly power" (Pet. App. 44a) was addressed not to the power of large carriers to impose rates to shippers that exact monopoly profits, but merely to the fact that some short lines connect only to a single larger carrier. If the court's concern about "unfairness" is limited to division of monopoly profits, which cannot arise, it addresses a straw man.

[27] Although it appears elsewhere in the Staggers Act (49 U.S.C. § 10706 note), the term "unfair" does not appear in the NTP set forth by that Act. The term "fair" appears in the NTP only in contexts not here relevant. 49 U.S.C. §§ 10101a(2) ("fair and expeditious regulatory decisions"), (12) ("fair wages").

[28] In addition to requiring consideration of the NTP, section 10505(a)(2) expresses Congressional concern about "protect[ing] *shippers* from the abuse of market power" (emphasis added), but there is no comparable protection specifically directed at other carriers. Subsequent to the decision in this case the court below concluded that the provision of section 10505(a)(2) concerning protection of shippers embodies a policy that requires ICC scrutiny of the fairness of the post-deregulation division of profits between railroads and shippers even where the shippers are receiving compensatory amounts. *Coal Exporters Ass'n* v. *United States*, No. 83-1629 (D.C. Cir. Sept. 18, 1984), slip op. 38-47. Since subsection (2) applies only to protection of shippers, the court's analysis in that case (if correct) tends to negate the presence of a similar requirement in the NTP referred to in subsection (1).

[29] The court cited subsection (13) of the NTP, stating a policy "to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination," and asserted that "[t]his antidiscrimination policy was meant to provide safeguards against 'predatory practices which constitute unfair competition. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 * * *" (Pet. App. 48a; *sic*). (In fact, the court misquoted

relied largely upon statements in House debates concerning other requirements of the ICA not set forth in the NTP (Pet. App. 45a-49a).[30]

In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), this Court noted that the NTP was not "a set of self-executing principles that inevitably points the way to a

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the House report, which was addressing the entire NTP and not the antidiscrimination policy and did not purport to establish a policy against "unfair competition" going beyond the 15 points of section 10101a.) The court simply declared that "it is unfair competition for a large long-haul carrier to appropriate a captive short-haul carrier's joint rate profits * * *" (Pet. App. 48a), but cited no legislative history or other authority indicating that Congress intended in this deregulatory statute (or elsewhere) to require the ICC to embark on an unprecedented inquiry as to the "appropriate" or "fair" division of profits under joint rates.

The court also cited subsection (10) of the NTP, which "encourage[s] honest and efficient management of railroads, and, in particular, the elimination of noncompensatory rates for rail transportation." However, this provision and the statement about it in the House debates which the court quoted (Pet. App. 48a-49a) are explicitly addressed to the overall rates *to shippers*, not to the division of profits among carriers participating in through movements. *See* 126 Cong. Rec. 18274 (1980) (remarks of Rep. Eckhardt).

Finally, the court cited subsection (4) of the NTP, but that provision merely seeks to ensure "a sound rail transportation system with effective competition among rail carriers."

[30] The court quoted a statement by Rep. Lee asserting that, under the exemption provision already part of the Staggers bill, a large carrier should not be allowed to "squeeze" a smaller carrier on a joint rate or division (Pet. App. 46a-47a). However, Rep. Lee was discussing provisions concerning small carriers he proposed for inclusion in section 10705a—which provided for joint rate surcharges and cancellations in specified circumstances—and he identified no provision of the NTP that would address this issue. Moreover, neither section 10705 nor section 10705a purports to regulate "fairness" of divisions; they only authorize changes in existing joint rates, and they have not previously been construed as barring joint rate cancellations, or prohibiting particular joint rates or divisions because of "unfairness" in divisions of profits. In relying upon Rep. Lee's statement about section 10705a the court also misapprehended the relationship between that section and section 10705(e) (*see* pp. 6-7 n. 7, *supra*), under which carriers can cancel joint rates regardless of whether section 10705a is satisfied. *Southern Ry.* v. *ICC*, 681 F.2d 29, 35 (D.C. Cir. 1982).

clear result in each case," and held that resolution of conflicts among those "overlap[ping]" principles "is the task of the agency that is expert in the field." *Id.* at 92. Significantly, the court cited no indication that the ICC, which is primarily responsible for implementing the ICA and the Staggers Act exemption mandate, has ever suggested that the NTP addresses the "unfairness" of divisions of profits from joint movements. Congress has not provided, and this Court has never held, that the courts may supplement or define the principles of the NTP by adding elements not found there by the expert agency.

Finally, even if its analysis of the ICA were correct, the court erred in taxing the ICC with having failed to consider the court's novel "fair divisions" reading of the NTP, as it had not been urged by any party in the extensive proceedings before the ICC nor in the briefs in the court of appeals

. *See, e.g., United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978). This error was especially grievous in light of the court's disregard of the clear meaning of the ICC's related findings. The ICC could not have found that efficient routes would be maintained in the absence of joint rate regulation unless it had also determined that the divisions of revenues reached in bargaining between participating carriers would be sufficient to sustain efficient operations by all participating carriers. (see n.27, *supra*).

2.

In holding that the car hire exemption constituted not deregulation but affirmative "substantive" regulation permissible only under section 11122, the court applied an erroneous standard for determining what constitutes an exemption authorized by Congress and was in conflict with other decisions

of this Court.[31] The Court's premise is reflected in its description of the impact of the partial car hire exemption:

> Under the *Boxcars* decisions, the originating carrier enters negotiations against a background in which it has a statutory entitlement equivalent to the amount of per diem [prescribed rental charges]. The destination carrier, however, now has a statutory entitlement equivalent to the storage fees[32] and the empty return charges. In striking contrast, had the Commission actually deregulated car hire, then neither party would enter negotiations with a statutory entitlement and the market alone would establish the relative bargaining positions of the parties. It thus becomes obvious that the Commission has shifted entitlements to a point that represents neither deregulation nor the pre-*Boxcars* design. [Pet. App. 61a.]

Even assuming arguendo that the court correctly described the result (and it did not),[33] the court's "entitlements" rule is an erroneous and severe limitation of the ICC's exemption authority under section 10505. Absent total deregulation of prices and services, any exemption can be said to reflect a policy choice to permit new forces to offset the regulatory

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[31] In divining a Congressional intention that exemptions result in all respects in "*decreased* regulation" (emphasis in original), the court of appeals relied upon irrelevant state court decisions construing a state property tax exemption statute and a lease provision for exemption from liability (Pet. App. 57a, citing *Maine Water Co.* v. *City of Waterville*, 93 Me. 586, 45 A. 830 (1900); *Davidow* v. *Jenks*, 48 N.Y.S.2d 586, 587 (N.Y. Sup. Ct. 1944)).

[32] Contrary to the court's characterization, the exemption does not authorize "storage fees," but, as would the market, merely permits avoidance ("reclaim") of per diem when neither the user nor the owner has a use for the car. A car owner can reinstate the accrual of car hire by ordering the empty car sent home.

[33] The court's description overlooked the relation of the car hire exemption to the joint rate exemption and the basic free market bargaining process permitted by both parts of the boxcar exemption. The joint rate exemption enables an originating carrier to respond to a terminating carrier's assessment of empty movement charges, *e.g.*, by cancelling joint rates, or increasing the rate for its portion of through movements which result in empty returns (Pet. App. 165a, 170a, 175a-76a). Thus, the ICC did not simply shift

"entitlements" of those benefitted by the remaining regulation, yet that fact has not impaired any of the ICC's major exemptions approved by the courts to date.[34] The court cited no indication of Congressional intent that partial exemptions that achieve only limited deregulation are beyond the scope or intent of section 10505.[35]

In rejecting the ICC's use of its deregulatory exemption authority under section 10505, based in part on the existence of rulemaking authority under section 11122, the court of appeals also relied on this Court's recent decision in *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984) *("ATA")* (Pet. App. 66a-68a), which the parties had no opportunity to address below. However, rather than support the court of

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the relative entitlements of the parties, but significantly increased the extent to which market forces can influence inter-carrier relations by freeing both originating and terminating carriers *pro tanto* from restrictions on pricing their services (*see* Pet. App. 176a). Of course, the car hire partial exemption would achieve a significant measure of deregulation even if there were no exemption as to joint rates. In either event, while the result may be less than total deregulation, the car hire exemption is nevertheless a substantial step in that direction.

[34] *See, e.g., American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (court sustained partial exemption of specified category of rail transportation from most but not all statutory provisions, thereby altering bargaining positions of such carriers vis-a-vis shippers); *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) (partial exemption affirmed even though it did not allow market forces to operate fully and reflected a "policy choice" the impact of which favored some parties more than others); *cf. National Small Shipments Traffic Conf.* v. *CAB*, 618 F.2d 819, 832 (D.C. Cir. 1980) (agency properly exercised deregulatory authority in exempting certain air carriers from specified regulatory requirements, thereby altering bargaining positions of parties or asserted statutory entitlements).

[35] The legislative history cited by the court indicated only that Congress' goal in section 10505 and other provisions of the Staggers Act was to eliminate needless regulation where possible and to limit or reduce the remaining regulation to a level constituting the least extent necessary to satisfy the NTP, in order to afford greater reliance upon the marketplace (Pet. App. 58a-59a). The ICC's construction of its exemption authority here is consistent with that intent.

appeals' crabbed reading of the ICC's exemption authority, *ATA* suggests that the court erred in not according the ICC appropriate "latitude to interpret its statutory powers in a reasonable manner." *Id.* at 2465.[36] The court of appeals also disregarded 49 U.S.C. 10321(a) (see p. 3, *supra*), relied upon by this Court in *ATA*, providing that enumeration of one ICC power does not exclude any other. *Id.* at 2467 n.11.

The court of appeals' determination that the ICC could achieve the partial deregulation it sought only through a rulemaking proceeding also conflicts with the decisions of this Court establishing the "well-settled principles" that agencies have broad discretion to determine which of their authorities to invoke to achieve a desired result; that their actions are presumed valid; and that courts must defer to and accept an agency's reasonable interpretation of its own statutory authority if not contrary to the clearly expressed intention of Congress. *E.g.*, *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 81 L.Ed.2d 694, 702-04 (1984); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86-87, 98-99 (1975); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

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[36] This Court had also previously recognized that the ICC's express authority to sanction or prevent railroad conduct in its entirety includes implied or ancillary authority to take intermediate or conditional action short of complete sanction or prevention. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-57 (1978); *United States* v. *Chesapeake & O. Ry.*, 426 U.S. 500, 509-15 (1976).

CONCLUSION

This Court should grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BRAE CORPORATION, ET AL.

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

AHNAPEE & WESTERN RAILWAY COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in determining to exempt railway boxcar traffic from regulations regarding joint rates among connecting railroad lines, the Interstate Commerce Commission was required to ensure that the proposed exemption would preserve the court's conception of a "fair division" of revenues among carriers participating in joint rate agreements, a requirement not contained in the statutory exemption provision or the National Rail Transportation Policy.

2. Whether a partial exemption from certain regulations regarding the interchange of boxcars among railroads, which would have the effect of introducing market incentives into an otherwise-regulated relationship, constitutes "regulation" rather than "deregulation" and is thus beyond the scope of the Commission's exemption authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-550

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BRAE CORPORATION, ET AL.

No. 84-867

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

AHNAPEE & WESTERN RAILWAY COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-93a) is reported at 740 F.2d 1023. The initial decision of the Interstate Commerce Commission (Pet. App. 103a-152a) is reported at 367 I.C.C. 423, and its opinion on denial of motions for reconsideration (Pet. App. 153a-189a) is reported at 367 I.C.C. 745. The Commission's denial of motions for a stay pending judicial review (Pet. App. 190a-214a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 219a-220a) was entered on June 27, 1984, and peti-

tions for rehearing were denied on August 27, 1984 (Pet. App. 96a, 97a-98a). The petition for a writ of certiorari in No. 84-550 was filed on October 4, 1984. The petition in No. 84-867 was filed on November 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

1. Regulatory Framework

In 1976, and again in 1980, Congress passed legislation departing in major respects from the century-old scheme of pervasive regulation of railroads under the Interstate Commerce Act. Among the key features of the traditional scheme was the required publication and filing of tariffs by railroads specifying each of their freight rates, with an opportunity for shippers and competitors to challenge those rates before the Commission either when they were filed or at any time thereafter. Pet. App. 106a; see *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932). As the Commission has noted (Pet. App. 106a), this regulatory regime was designed to "preserve rather complex, rigid relationships among the freight rates charged to competing shippers located throughout the country."

A particularly rigid aspect of this scheme was its treatment of "joint rates." A joint rate is a single rate charged by two or more railroads for transportation over interconnecting lines; the joint rate agreement provides for the division of revenues among the participating carriers. Once a railroad entered into a joint rate agreement, it could not withdraw, or change the terms of the tariff, in the absence of consent by other participants, without the threat of suspension of the revised tariff by the Commission and initiation of an adversarial proceeding. As the Commission has noted (Pet. App. 106a), making a change

in a joint rate under this system was "extraordinarily expensive and time consuming." See also *Southern Ry.* v. *ICC*, 681 F.2d 29, 34 (D.C. Cir. 1982).

This complex system of railroad regulation was predicated on the assumption that railroads had extensive market power over the shippers they served. However, with the rise of competitive modes of transportation, especially trucking, railroads lost revenue and often found it difficult to compete, in part because of the rigidities of the regulatory regime. See S. Rep. 96-470, 96th Cong., 1st Sess. 5 (1979). With the bankruptcy of the Penn Central and other railroads in the 1970s, the national railway system was seen to be in crisis, and Congress determined that the decline of the industry was caused in large part by excessive governmental regulation. See, *e.g.*, S. Rep. 94-499, 94th Cong., 1st Sess. 2-4, 10-11 (1975).

Congress's first response, in 1976, was the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. 801 *et seq.* Among other deregulatory aspects of that legislation, Congress authorized the Commission to exempt from regulation services or transactions that were of "limited scope" where regulation was found to impose an "undue burden" and to "serve little or no useful public purpose." See 49 U.S.C. (Supp. IV 1980) 10505. The Commission was required to provide notice and an opportunity for a hearing to interested parties before either making an exemption or revoking it. 49 U.S.C. (Supp. IV 1980) 10505(a) and (d).

Congress soon recognized that the reforms of the 1976 Act had not sufficiently improved the ability of the railroads to compete for traffic. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79 (1980). Consequently, it enacted the Staggers Rail Act of 1980, 49 U.S.C. 10101 *et seq.* In Section 2(3) and (9) of

the Act, 49 U.S.C. 10101a note, Congress declared its findings that today "most transportation within the United States is competitive" and that "modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads." As part of the Act, Congress established a 15-element National Rail Transportation Policy, 49 U.S.C. 10101a (reprinted in App., *infra*, 1a-2a). The first two elements of the transportation policy (49 U.S.C. 10101a) are:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system.

An "important cornerstone" of the Staggers Act (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 79 (1980)) was a substantial expansion of the Commission's exemption authority. The Commission is now directed to grant an exemption whenever it finds that further regulation is not necessary to carry out the National Rail Transportation Policy and either that the transportation or services involved are of "limited scope" or that further regulation is "not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a)(2).[1] The Commission is instructed to revoke an exemption in whole or in part if it later concludes that regulation is necessary (49 U.S.C. 10505(d)). Significantly, Congress eliminated the requirement that exemption and revocation decisions must be preceded by notice to interested parties and an opportunity for a hearing. 49 U.S.C. 10505

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[1] The authority is limited in several additional respects not relevant here. See 49 U.S.C. 10505(e) and (g).

(b) and (d); H.R. Conf. Rep. 96-1430, *supra*, at 104-105.

In addition to the exemption in this case, the Commission has used its authority under Section 10505 to exempt from regulation the rail transportation of various commodities (*e.g.*, fresh fruits and vegetables, liquid iron chloride, frozen foods, and coal for export). It has also exempted all transportation provided in "piggyback" equipment (trailers and containers on flatcars), and has exempted all rail transportation from certain requirements of 49 U.S.C. 10726 (long and short haul provisions).

2. The Commission's Decision

On consideration of comments filed by more than 200 parties, including four federal departments, the Commission (over the dissent of Chairman Taylor) issued a decision (Pet. App. 103a-152a) exempting railway boxcar traffic (other than carriage of nonferrous recyclable materials) from major regulatory restrictions under the Interstate Commerce Act.[2] The decision may conveniently be divided into three parts: (1) exemption of boxcar traffic from maximum rate regulation, (2) exemption of boxcar traffic from regulatory provisions restricting a carrier's right to withdraw from or to change a joint rate agreement, and (3) partial exemption of railroads from regulations setting the terms of rentals of boxcars owned or leased by one carrier while they are under the control of another. The Commission also removed all antitrust immunity from the exempted activities. The Commission granted the exemption on the statutory ground that "continued regulation is

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[2] Although not required under the Act to do so, the Commission published a notice of proposed rulemaking, 47 Fed. Reg. 4100 (1982), and invited, received, and considered comments from interested parties. See Pet. App. 108a-111a.

not necessary either to carry out the rail transportation policy of section 10101a or to protect shippers from the abuse of market power" (Pet. App. 112a).

a. With respect to maximum rate regulation, the Commission determined that continued regulation is not necessary to carry out the statutory policy (49 U.S.C. 10101a(6)) of maintaining reasonable rates in the absence of effective competition. The Commission reasoned that truck competition for the transportation of commodities ordinarily transported by boxcar is "pervasive and limits the railroads' pricing freedom" (Pet. App. 113a). Unlike other forms of railway transportation, where there is no convenient trucking alternative, boxcars face intense competition from trucks across their full line of service. "Virtually anything that can be transported in a boxcar can be transported in a truck," and since truck transport "tends to be faster, more accessible, more convenient, and sometimes less damaging to freight than rail service," railroads can compete for boxcar commodities only by offering a better price. *Ibid.* In addition, there are constraints deriving from other forms of transportation, product competition, geographic competition, and "leverage" exercised by "powerful shippers" (*id.* at 113a-114a). "Thus, the market itself places an effective ceiling on rail rates for boxcar transportation, and regulation is unnecessary to assure that boxcar rates do not rise to unreasonably high levels" (*id.* at 113a).

b. Several parties before the Commission questioned the application of this boxcar exemption to joint rates, which are regulated under 49 U.S.C. 10705. The Commission found, however, that the competitive character of transportation of boxcar commodities leads to the same conclusion for joint as for single-line rates. It therefore concluded that continued regulation of joint rates was not necessary to

carry out the statutory policies of developing and continuing a sound rail transportation system (49 U.S.A. 10101a(4)) or providing effective coordination among railroads (49 U.S.C. 10101a(5)). See Pet. App. 123a.

The Commission reasoned that efficient joint rates would be preserved because, "[i]n the face of truck competition, carriers have strong incentives to make through rail service as attractive as possible" (Pet. App. 123a). Participating carriers would neither cancel efficient joint rates nor "insist on a division of profits so disproportionate as to force the other to withdraw from the movement" (*id.* at 124a).

On petition for reconsideration, the Commission further explained (Pet. App. 161a) that joint rates could be cancelled even under regulation; the effect of the exemption was therefore to avoid the "unnecessarily expensive and time consuming" manner of resolving disputes under the prior system. Moreover, there exist other means of handling through traffic efficiently "even in the absence of joint rates" (*ibid.*). Most importantly, the Commission reiterated that "where joint rates enhance the attractiveness of through rail service, we expect that they will continue to be offered even in the absence of regulation" because both small and major carriers "benefit from the revenue earned on this traffic" (*ibid.*). The need to compete with trucks will induce railroads to use the most efficient routes available, whether joint or single-line. "Carriers cannot afford the luxury of preserving inefficient routes when competitive pressures force them to reduce costs as much as possible" (*id.* at 162a (footnote omitted)). See also Pet. App. 199a-200a.

c. The third major part of the Commission's decision was its partial exemption of boxcars from the prior scheme of mandatory rental charges for roll-

ing stock owned by one railroad while it is on the lines of another. Under these rules the "originating" carrier—the boxcar owner or lessee—had the right to charge the "terminating" or "destination" carrier—the railroad with control over the boxcar—a rental fee (called a "per diem"), up to a maximum rate set by the Commission, even when the car stood idle on the terminating carrier's tracks. Moreover, the originating carrier could demand the return of its car at the terminating carrier's expense. The terminating carrier was obliged to pay these fees, if demanded by the originating carrier, and was prohibited from imposing fees for the costs of storage or of returning the cars. Pet. App. 163a-164a.

The Commission found that these car hire rules had two deleterious consequences. First, they created an incentive for "unnecessary cross hauling of empty cars" (Pet. App. 163a). Since railroads receive rental fees when their own cars are on the tracks of another railroad, they will tend to load their own cars with cargo and return the cars of other lines empty. This unnecessary criss-crossing of empty boxcars inflates operating costs. See (*ibid.*). Second, the per diem rates "create[d] at least the illusion of a guaranteed return on investment," thus "encouraging investors to acquire cars without regard to the adequacy of the existing fleet." *Id.* at 164a. See also Pet. App. 127a-128a.

The Commission's solution was to exempt all negotiated agreements from the car hire regulations and to create an incentive to reach agreements by permitting terminating carriers to offset storage fees on empty boxcars stored for more than three days against the per diems up to the per diem rate and

to charge up to the variable cost of returning empty boxcars upon request (35 cents per mile).[3]

The Commission concluded that the exemption of boxcars from rate regulation (both joint and single rate) and the partial exemption from car hire rules would benefit the public by providing improved transportation service, lower overall rate levels, and better car use. Pet. App. 138a. The Commission emphasized, however, that it would stand ready to revoke the exemption, in whole or in part, if experience showed that reregulation was necessary (*ibid.*):

> The public should be apprised that we have every intention of reviewing this matter, and we wish to leave no doubt that we will correct problems should they develop as we gain experience under this exemption.

3. The Court Of Appeals' Decision

The court of appeals sustained the Commission's decision to exempt boxcar traffic from maximum rate regulation insofar as it pertained to transportation not involving joint rates. The court affirmed the Commission's "finding that rail carriers did not have monopoly power in the market for transport of commodities shipped by boxcars" (Pet. App. 33a). The

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[3] In its initial decision, the Commission commented that its partial exemption from the car hire rules "could be construed in some respects as being new regulation" (Pet. App. 136a). "To allay any doubts" regarding its statutory authority, therefore, the Commission relied on its regulatory authority under 49 U.S.C. 11122 as well as its exemption authority under 49 U.S.C. 10505 (Pet. App. 136a). In its opinion on denial of petitions for reconsideration, the Commission, for procedural reasons, "withdr[e]w any reliance on section 11122 as authority" for its decision (*id.* at 167a), noting that the action was in fact a "partial exemption from regulation subject to conditions" (*ibid.* (footnote omitted)) and thus within its exemption authority.

court also approved "the Commission's position that its authority to revoke the exemption is an appropriate mechanism to correct any post-exemption market abuse" (*ibid.*).

However, the court overturned the exemption as it applied to joint rates.[4] In so doing, the court did not question the Commission's determination that continued regulation was not necessary to protect shippers from an abuse of market power (see 49 U.S.C. 10505(a)(2)(B)), but rested its decision on the conclusion that the Commission had inadequately considered the necessity of the regulation under the National Rail Transportation Policy, 49 U.S.C. 10101a. See Pet. App. 42a.

The court held (Pet. App. 42a) that the Commission failed "to adequately explain its crucial assertion that large long-haul carriers will not close off efficient routes of small short-haul carries." Moreover, the court found an "even more fundamental problem" with the Commission's analysis—its "assumption that the [National Rail Transportation] policy is satisfied as long as efficient routes are not cancelled or forced out of service." *Id.* at 44a. Specifically, the court stated (*id.* at 45a) that the Commission "totally ignored the division of profits" between large long-haul and small short-haul carriers.

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[4] Since an estimated 70% of all rail traffic moves over routes subject to joint rates (see H.R. Rep. 96-1035, *supra*, at 41), the portion of the court's decision that upheld the Commission's exemption will affect but a small part of the industry. The court acknowledged (Pet. App. 92a) that deregulating single line transportation but not joint rate transportation could cause a "disequilibrium" in the transportation market, because it might induce shippers to shift from the regulated to the unregulated sector, or vice versa, or create "other dislocations in the boxcar freight market."

The court of appeals also invalidated the Commission's partial exemption from the car hire rules, on the rationale that the partial exemption was in fact "regulation" rather than "deregulation," and thus not authorized under Section 10505. Pet. App. 60a-69a. This is because, "[i]n allowing storage charges and return fees the Commission, rather than merely deregulating, has altered the relative bargaining positions of the carriers and has influenced the allocation of the benefits that will flow from the cost savings associated with decreasing market inefficiencies" (*id.* at 60a).[5]

ARGUMENT

In passing the Staggers Rail Act of 1980, Congress formally concluded that "most transportation within the United States is competitive" and that "many of the Government regulations affecting railroads have become unnecessary and inefficient." § 2(3) and (4), 49 U.S.C. 10101a note. Although Congress itself was not able to identify every application of regulations that is now unnecessary and inefficient, it entrusted the Commission with the power to do so by "actively pursuing exemptions." H.R. Rep. 96-1035, 96th Cong., 2d Sess. 60 (1980); H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980). Congress intended that, through its exemption power, the Commission would remove "as many as possible of the Commission's restrictions on charges in prices and services by carriers" and urged the Commission to "adopt a policy of reviewing carrier actions after the fact to

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[5] The court of appeals also rejected the Commission's application of the boxcar exemption to the Alaska Railroad (Pet. App. 69a-83a); the Commission has not petitioned for review of that portion of the judgment. The court upheld the Commission's decision against specific challenges by Canadian railroads and the Port of Oakland (*id.* at 83a-91a).

correct abuses of market power" (*ibid.*). Exercise of the exemption authority is therefore intended to be "experimental" and "innovative" (H.R. Rep. 94-725, 94th Cong., 1st Sess. 243 (1975)). Indeed, to free the Commission from administrative constraints and enable it to act quickly and flexibly, Congress even took the extraordinary step of allowing the Commission to impose or to revoke exemptions without giving notice or an opportunity for a hearing.

The Commission's decisions in this case and in its *Railroad Exemption—Export Coal*, 367 I.C.C. 570 (1983), vacated and remanded, 745 F.2d 76 (D.C. Cir. 1984), petition for cert. pending, No. 84-884, are two examples of the Commission's aggressive use of its exemption authority, in precisely the active and experimental manner Congress intended. In both instances, the District of Columbia Circuit has invalidated the Commission's exemption decision without disturbing the agency's findings that competitive factors would generally inhibit abuses of market power by the newly deregulated railroads, and that any abuses that might occur could be remedied by carefully-tailored revocations. Both court decisions were based on the concern that in some instances the division of profits from the activities in question might not be "fair." In the *Export Coal* case, the question is whether *shippers* might receive less than their fair share of the "rents" derived from the movement of coal for export; the basis for the court's decision was the importation of regulatory policies from other sections of the Act into the concept of "abuse of market power" under 49 U.S.C. 10505 and a criticism of the Commission's balance of the competing policies within

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[6] See Brief for the United States, *ICC* v. *Coal Exporters Ass'n*, No. 84-884. A copy of that brief will be provided to the parties in this case.

the National Rail Transportation Policy, 49 U.S.C. 10101a.[6] In this case, the question is whether smaller *carriers* might receive less than their fair share of the "rents" derived from the movement of cargo on through routes; the basis for the court's decision was the importation of policies found in the legislative history of 49 U.S.C. 10705a into the National Rail Transportation Policy and the court's own independent assessment of the content and relative importance of parts of that Policy.

The consequence of the decision below, especially in light of the similar decision in the *Export Coal* case, is to frustrate the Commission's ability to comply with its deregulatory mandate under the Staggers Act. Rather than being able to exempt broad categories of rail transportation service from regulation on the basis of a reasoned assessment of competitive factors, and to protect against possible abuses through the revocation authority, as Congress intended, the holdings in these decisions will require the Commission to guarantee, in advance, that shippers and smaller carriers will continue to receive a "fair" level of revenues that in many cases might be in excess of that set by the market. Any other outcome, according to the court below, would "[c]ertainly" (Pet. App. 48a) or "self-evident[ly]" (*id.* at 45a) be in violation of the National Rail Transportation Policy.

Although generally phrased in terms of requiring the Commission to "consider" a relevant, but overlooked factor, the decision below in fact engrafts an additional substantive requirement on the Commission's exemption authority. Fidelity to the Court's interpretation of the National Rail Transportation Policy might well preclude the Commission from issuing a broad exemption where it cannot guarantee

that the division of rents after deregulation will not be adverse to smaller carriers.[7]

The decision below conflicts with the only other court of appeals decision dealing with the exemption of a type of transportation service ("piggyback" transportation), and with general principles established by this Court for judicial review of policy decisions by the Commission pursuant to explicit delegation of authority. But even in the absence of a conflict, the decision below would warrant review because any exercise by the Commission of its exemption authority is reviewable in the District of Columbia. 28 U.S.C. 2343. As a practical matter, the Commission will be compelled to conform its future exemption decisions to the court's holding. The result will be to eviscerate "an important cornerstone" of the congressional effort to decrease unnecessary and inefficient regulation of the railroad industry.[8]

1. Joint Rates

There are two statutory prerequisites to the Commission's exercise of its exemption authority. The Commission must find, first, that continued regulation "is not necessary to carry out the transportation policy" of the Act. This refers specifically to the 15 elements listed in 49 U.S.C. 10101a. The Commis-

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[7] As if to underscore that its decision is substantive, and not merely procedural, in character, the court warned the Commission that subsequent rules "of course must avoid the problems we have identified in this opinion of large carriers abusing their power over small carrier co-participants in through routes" (Pet. App. 93a, citing *ILGWU* v. *Donovan*, 733 F.2d 920 (D.C. Cir. 1984) (in which the agency, on remand and after consideration of the relevant factors identified by the court, reinstated a limited version of its former rule on a temporary basis, and was reversed by the court for so doing)).

[8] If the petition is granted, the United States and the Commission undertake to file a joint brief on the merits.

sion must find, second, that continued regulation is "of limited scope" or "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a). The second test was concededly satisfied in this case (Pet. App. 33a-34a) and, accordingly, the court of appeals' decision was based entirely on the determination that continued regulation of joint rate agreements involving boxcar traffic may be necessary to carry out the National Rail Transportation Policy.

The Commission found that, as a result of competition from the trucking industry, the railroads have lost much of the traffic that has historically been moved by boxcar, and that "[t]his trend will not be arrested unless the railroads can enhance the attractiveness of boxcar service through cost reduction and more flexible pricing" (Pet. App. 156a). Relying heavily on its experience with previous exemptions, especially the exemption for "piggyback" service, in which "declines in railroad traffic were dramatically reversed with the cessation of regulation" (*id.* at 182a), the Commission predicted that the exemption here would enable the railroads to attract traffic back to boxcars, to the benefit of both large and small carriers as well as the public (*id.* at 162a). The Commission thus concluded (*id.* at 126a) that the exemption

> will actively promote the objectives of the rail transportation policy in a number of ways. Clearly, it will: (1) allow competition and the demand for services to establish reasonable rates (section 10101a(1)); (2) minimize the need for Federal regulatory control over a substantial portion of the rail transportation system (section 10101a(2)); (3) promote more efficient pricing and service on boxcar traffic and allow carriers, to the extent possible, to earn adequate revenues on this traffic, by removing procedural

> regulatory burdens and allowing rail management to respond flexibly to market conditions (section 10101a(3)); (4) promote effective competition with motor carriers (sections 10101a(4) and (5)); (5) encourage efficient railroad management and elimination of noncompensatory rates by allowing full flexibility to manage boxcar service in the most economic manner (section 10101a(10); and finally, (6) to the extent that it enables railroads to retrieve business lost to the motor carrier industry, promote energy conservation (section 10101a(15)).

The court of appeals did not address, or even allude to, these findings regarding the National Rail Transportation Policy, and they may therefore be assumed to stand.

The court, however, found fault with the Commission's conclusion that continued regulation is not necessary to carry out the transportation policy because the Commission gave inadequate attention to the "division of profits [between large and small carriers] likely to result * * * in the absence of regulation" (Pet. App. 45a).[9] It reached this conclusion

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[9] The court also found that the Commission had failed adequately to explain "its crucial assertion that large long-haul carriers will not close off efficient routes of small short-haul carriers" (Pet. App. 42a). However, the Commission's extensive discussions of this question (see *id.* at 123a-124a, 161a-162a, 199a-200a) are based on the same rationale that, as the court agreed, justified the exemption of single-line rates from regulation. The rationale is that competitive pressure from trucks and other sources is so intense that rail carriers must, in order to compete effectively for boxcar traffic, use the most efficient routes possible. Accord, *Central Vermont Ry.* v. *ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983); *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 377 (7th Cir. 1983) (in an unregulated market "it would be commercial suicide" for long-haul carrier to close efficient through routes over the lines of other carriers). Elsewhere in its opinion, the court seemingly

on the basis of its own independent analysis of the statutory policy.

The court focused on three of the 15 elements of the National Rail Transportation Policy. First, the court invoked the statutory policy of encouraging "the development and continuation of a sound transportation system with effective competition among rail carriers" (49 U.S.C. 10101a(4)), interpreting this policy as reflecting "Congress' unquestionable concern that large carriers might unfairly squeeze profits from captive small carriers" (Pet. App. 47a). Second, the court cited the policy of safeguarding against "predatory pricing and practices * * * and * * * unlawful discrimination." 49 U.S.C. 10101a (13); see Pet. App. 48a. The boxcar exemption would violate this policy, according to the court, because it "[c]ertainly" is "unfair competition" for a larger carrier to use its "monopoly power" to "appropriate a captive short-haul carrier's joint rate profits that derive from the smaller carrier's efficiency" (*ibid.*). Third, the court looked to the policy of encouraging the "elimination of noncompensatory rates for rail transportation." 49 U.S.C. 10101a (10); see Pet. App. 48a The court inferred, as a negative implication, that this policy prevents "monopoly carriers from charging rates that produce an unreasonable return for their costs" (*id.* at 49a).

The court thus found that "a fair division of joint rates [is] an important means of carrying out the rail transportation policy" (Pet. App. 50a), and made

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acknowledged that the Commission had fully addressed this point. See, especially, Pet. App. 39a-41a, 45a, 46a; see also *id.* at 63a ("if there are inefficiencies creating unnecessary costs, the parties, inspired by the lure of larger profits, will negotiate to save these costs regardless of their initial bargaining positions").

clear that such a "fair" division might require more than a compensatory return in some cases (*id.* at 46a, 48a). Accordingly, the court invalidated the boxcar exemption, as it applies to joint rates, because of the Commission's purported "total failure to consider the effect of joint rate exemption on this division" (*id.* at 50a).

There are three serious errors in the court's decision.

a. Most important to the Commission's continued ability to employ its Staggers Act exemption authority in the manner Congress intended is that the court of appeals injected an additional, and troublesome, element in the National Rail Transportation Policy that was not enacted or intended by Congress—that is, ensuring the "fair division" of profits between large long-haul and small short-haul carriers. The court's labored interpretations of 49 U.S.C. 10101a(4), (10) and (13) (see Pet. App. 45a-49a) amply make the point. The policies cited by the court are designed to promote "competition among rail carriers" (49 U.S.C. 10101a(4))—not, as the court would have it, to protect smaller carriers from the consequences of competition; to prevent "predatory pricing" and "unlawful discrimination" where the antitrust laws are inadequate to do so (49 U.S.C. 10101a(13))—not, as the court would have it, to prevent hard bargaining over various compensatory levels of return; and to eliminate "noncompensatory rates for rail transportation" (49 U.S.C. 10101a(10))—not, as the court would have it, to preclude rail carriers from earning more than a compensatory return in a competitive market. Certainly, none of these policies expressly, or by necessary implication, requires the Commission to shield smaller carriers from competition where, as the Commission found, efficient through routes and

joint rates would be preserved. See *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 376 (7th Cir. 1983).

There is no established policy that the Commission has an obligation to oversee the "fairness" of divisions of revenues from joint rates, under Section 10705 or elsewhere. The general rule is that, although the Commission has authority to establish "reasonable" divisions of joint rates (49 U.S.C. 10705(a)(1)), divisions are normally a "private matter" between the connecting carriers. *Pennsylvania* v. *ICC*, 561 F.2d 278, 282 (D.C. Cir. 1977), cert. denied, 434 U.S. 1011 (1978); see *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136, 139 n.2 (1917); *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 382 n.8 (D.C. Cir. 1979). Thus, even assuming that the court of appeals is correct that in exempting boxcar traffic from the joint rate regulations of Section 10705 the Commission had to "consider why Congress adopted the provision in the first place" (Pet. App. 41a), it would not follow that it had to consider whether resultant divisions would be "fair."

The court of appeals' free-ranging interpretation of the National Rail Transportation Policy was based, in large part, on comments by members of the House of Representatives (quoted at Pet. App. 45a-47a) during debate on another section of the Staggers Act, now 49 U.S.C. 10705a. This Section permits carriers to cancel (or to impose surcharges on) noncompensatory joint rates, without Commission approval, with certain narrow exceptions. Since joint rate cancellations under Section 10705a would be permitted unilaterally, without Commission approval, and since they would be permitted even where the railroads have significant market power, members of Congress understandably were concerned about protection for

shippers and small carriers. The court erred, however, in treating these statements as authoritative guides to the National Rail Transportation Policy, to which they do not pertain. The quoted statements do not express any congressional judgment concerning *competitive* transportation services, as are involved here, where market forces constrain the ability of a carrier to exploit its position. Nor do they apply to exemptions under Section 10505, where shippers and carriers are protected by the Commission's continuing revocation power.

Significantly, the small carrier protective provisions of 49 U.S.C. 10705a discussed in the quoted legislative history do not apply to joint rate cancellations under 49 U.S.C. 10705(e). *Southern Ry.* v. *ICC*, 681 F.2d 29 (D.C. Cir. 1982). The Commission is free to approve joint rate cancellations, in the public interest, without addressing these provisions. It is curious for the court to hold that the policies reflected by those provisions are impliedly incorporated in the National Rail Transportation Policy, when they are not even incorporated in the companion section, 49 U.S.C. 10705(e).

One of the comments quoted by the court, by Representative Lee, indicates his hope that the "exemption clause"—presumably 49 U.S.C. 10505—would not be "used to 'end run' the joint rate provisions" of Section 10705a. However, nothing in the language or legislative history of the exemption provision suggests that any different standard was intended to apply to joint rate exemptions. Indeed, both Representative Madigan and Representative Staggers stated that the conferees "fully expect" the Commission to use its exemption authority to abolish joint rate requirements. 126 Cong. Rec. 28430 (1980); *id.* at 28431-28432.

Congress quite specifically set forth in 49 U.S.C. 10505, and by reference in 49 U.S.C. 10101a, the

standards it intended the Commission to apply in determining whether to grant an exemption. Those standards include explicit protections for *shippers* from an abuse of market power, but contain no such protection for competitive *carriers*. In requiring the Commission to conduct a painstaking analysis of the "division" of profits, over and above a compensatory return, between large and small carriers, the court of appeals has read into the National Rail Transportation Policy an element of its own making, and has elevated that element to a prominence that is wholly unwarranted.

b. But even assuming that the division of profits among carriers is a necessary element in transportation policy, it is evident that the Commission considered the issue; the court has supplied no reason, other than its own contrary opinion, for concluding that the Commission's judgment is arbitrary and capricious. The Commission found—and the court affirmed in another context (Pet. App. 32a-33a)—that railroad boxcar transportation faces stiff competition from trucks and other sources for virtually every commodity. Given that competition, the railroads have a strong incentive to reduce costs in every way possible, including using the most efficient routes. Accordingly, "it is unlikely that a carrier acting in an economically rational manner would close efficient routings," as the Commission stated (*id.* at 124a). Moreover, the Commission found that "[i]n reaching agreement on divisions on joint rates, neither carrier will insist on a division of profits so disproportionate as to force the other to withdraw from the movement to avoid a loss and thus to forfeit the traffic for both carriers" (*ibid.*). Large long-haul railroads "can not afford to undermine the health of the [small] carriers that supply them with an essential flow [of] traffic" (*id.* at

198a); "the penalty for a large connecting carrier that fails to allow the small carrier its required revenue is loss of this traffic and loss of a contribution toward its own capital cost" (*ibid.*).[10]

Far from being arbitrary or capricious, this conclusion is a sound economic judgment; a similar conclusion has been reached, in other contexts, by other panels and other courts. See *Detroit, T. & I.R.R.* v. *United States*, 725 F.2d 47, 50 (6th Cir. 1984); *Central Vermont Ry.* v. *ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983); *Chesapeake & O. Ry.* v. *United States*, 704 F.2d at 377.[11] The court of appeals' holding that

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[10] We are thus baffled by the court's repeated assertions that the Commission "totally disregarded," "total[ly] fail[ed] to address," or "total[ly] fail[ed] to consider" the effect of the joint rate exemption on the division of revenues between long and short haul carriers (Pet. App. 47a, 48a, 50a). The quotations in text plainly show that the Commission did so. Moreover, the issue has been considered by the Commission in greater depth in other contexts. See *Traffic Protective Conditions*, 366 I.C.C. 112, 122-126 (1982), aff'd in relevant part, 725 F.2d 47 (6th Cir. 1984).

In any event, the parties before the Commission did not raise the issue of the division of revenues, and nothing in the National Rail Transportation Policy explicitly addresses the question. The Commission could hardly be faulted for failing to give more attention to an issue that was not raised by the parties and is not part of its statutory standards.

[11] As the Commission pointed out (Pet. App. 174a-175a), small carriers have significant bargaining power in their dealings with larger carriers. Absent regulatory constraints or unusually high transaction costs, the only instances in which a long-haul carrier is able profitably to "squeeze" a more efficient short-haul carrier is when it has a route that is nearly as efficient as the short-haul carrier's route. *Traffic Protective Conditions*, 366 I.C.C. 112, 126 (1982), aff'd in relevant part, 725 F.2d 47 (6th Cir. 1984); see generally Carlton & Klamer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. Chi. L. Rev. 446, 452-453

this analysis is legally insufficient suggests a virtually insuperable barrier to exercise of the exemption authority. Congress did not expect that the Commission could guarantee, in advance, that an exemption would have its desired effects. "A decision to deregulate by exemption some portion of railroad transportation necessarily cannot be made on the basis of data from past experience—no such data exists." *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1127 (5th Cir. 1981). Deregulation is to be the norm, continued regulation of prices and services the exception. H.R. Conf. Rep. 96-1430, *supra*, at 105.

An oddity of the decision below is that the court's assumptions in this section of the opinion—that large carriers in fact possess "monopoly power" (Pet. App. 45a, 48a) such that they are able to obtain an "unreasonable" (*id.* at 49a), "disproportionate," (*id.* at 48a), or "exorbitant" (*ibid.*) return—are directly contrary to the court's explicit findings in Section II of its opinion that, with respect to boxcar traffic, "rail carriers d[o] not have monopoly power" (Pet. App. 33a) and thus lack the ability to extract unreasonable returns.[12] The Commission's conclusions regarding the competitive nature of boxcar transportation, affirmed by the court of appeals for one purpose, do not suddenly become arbitrary and capricious when applied to the joint rate issue.[13]

(1983). In such instances, the "squeeze" will perforce be relatively small and the efficiency loss likewise. The Commission would be justified in determining that such a loss would be outweighed by the benefits of the exemption in the ordinary case. Cf. *Traffic Protective Conditions*, 366 I.C.C. at 126.

[12] Perhaps the inconsistency is explained by the fact that different parts of the opinion below were written by different judges (Pet. App. 15a n.*).

[13] The court attempted to elide analysis by relying on a passage in the Commission's opinion in which, according to the

c. Further, even assuming the court's nonliteral reading of the transportation policy were valid, and that the court's economic assumptions rather than the Commission's determinations were controlling, the court still would have erred in overturning the Commission's decision. The Commission explicitly determined that the exemption would promote some seven elements of the National Rail Transportation Policy. See pages 15-16, *supra*. The court of appeals did not take issue with those determinations. The most that could be said, therefore, is that in this instance the various elements of the transportation policy may conflict. But the task of weighing conflicting elements of the national transportation policy has been entrusted to the Commission, not to the court of appeals. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957); *Erickson Transport Corp.* v. *ICC*, 728 F.2d 1057, 1066 (8th Cir. 1984); *Baggett Transportation Co.* v. *United States*, 666 F.2d 524, 530-531 (11th Cir. 1982); cf. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 26-28. It is not the place of the reviewing court to decide, contrary to the Commission, that it is "self-evident" that the consequences of the Commission's decision "would not comport with the rail transportation policy" (Pet. App. 45a).

d. The approach taken by the court below conflicts sharply with that taken by the Fifth Circuit in reviewing the Commission's earlier exemption of rail transportation in "piggyback" cars (trailers and containers on flatcars) from regulation under the

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court (Pet. App. 44a), the Commission "apparently conceded that large long-haul carriers may have monopoly power over small short-haul carriers." However, the cited page in the Commission's opinion, Pet. App. 124a, contains no such concession, and the opinion expressly and repeatedly expresses the opposite conclusion.

Act. *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (1981). Analytically, the two exemptions are virtually identical; in both instances, the Commission determined that competition from motor carriers and other sources was sufficient to guard against any abuse of market power. See 656 F.2d at 1123. In both instances, the exemptions applied to joint rates as well as to single line rates; the arguments adopted by the court below would therefore have been fully available to the Fifth Circuit as well. However, the Fifth Circuit easily sustained the exemption in relevant part, applying a narrow standard of review and deferring to the congressional judgment that the exemption authority should be used vigorously and experimentally. *Id.* at 1127. The court noted that Congress intended the Commission to "exercis[e] its exemption authority in the face of uncertainty as to the effect of an exemption," and to " 'review[] carrier actions after the fact to correct abuses of market power.' " *Ibid.*, quoting H.R. Conf. Rep. 96-1430, *supra*, at 105. The court of appeals here accorded no weight whatsoever to this congressional policy, and instead imposed additional substantive standards of its own making that—had they been applied to the "piggyback" exemption—would have invalidated that exemption as well.

If not reviewed, the decision below will seriously impair the Commission's ability to employ the exemption power in the way Congress intended. Virtually every exemption from every railroad regulation will open the possibility that some shippers or small competing carriers will be placed in a less advantageous bargaining position than they were under regulation. This will necessarily affect the "division" of profits from rail transportation. Congress did not intend to allow such concerns to stand in the way of elimi-

nation of unnecessary and inefficient regulation, where the regulation is not needed to carry out the National Rail Transportation Policy as a whole. In light of the importance of the Staggers Act exemption authority to the congressional purpose of revitalizing the rail industry, the decision below warrants review.

2. Car Hire Rules

The court of appeals' invalidation of the partial exemption of boxcars from the car hire rules is in error, is of considerable practical importance, and should be reviewed along with the joint rate issue.[14]

The court did not question the Commission's conclusion that the car hire rules, in the present context, are unnecessary and inefficient. Indeed, the rules have generated major unnecessary operating costs by creating an incentive for expansion of boxcar fleets without regard to demand for boxcar services, and for cross hauling of empty boxcars rather than returning a boxcar to its originating carrier with cargo. A significant portion of the savings from the boxcar exemption is expected to derive from the car hire portion of the exemption.

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[14] If the Court decides not to review the joint rate issue, we do not recommend considering the car hire issue independently. The decision below appears to leave room for adoption of this regulation on remand under other authority (Pet. App. 65a). Moreover, the car hire rules are under consideration in a wider context in Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299 (1980), and Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service—Advance Notice of Proposed Rulemaking*, 49 Fed. Reg. 27333 (July 3, 1984). While we are advised that neither of these proceedings is likely to render this case moot, they would offer the Commission alternative means for accomplishing its objectives in the event the petitions were denied.

The court of appeals, however, concluded that the Commission's action constituted "regulation" rather than "deregulation," and thus that it was beyond the agency's authority under 49 U.S.C. 10505. Pet. App. 60a-69a. The court reasoned that the Commission did not merely exempt terminating carriers from parts of the car hire rules, but instead "altered the relative bargaining positions of the carriers" and "influenced the allocation of the benefits that will flow from the cost savings associated with decreasing market inefficiencies" (Pet App. 60a).[15]

This is pure semantics. There can be no doubt that, had the Commission characterized its decision as exempting terminating carriers from the obligation to pay per diem charges, it would be considered "deregulation." Conversely, had the Commission characterized the decision as introducing a new, mandatory storage fee to be imposed at the option of the terminating carrier at a maximum level set by the Commission (equal to the per diem rate), this would appear to be "regulation." But the two decisions would have identical effects—and both are identical to the decision as actually set forth by the Commission. Similarly, while the imposition of a charge (subject to a 35 cents per mile limit) for returning an empty boxcar upon request might appear to be "regulation," it can as easily be said that exempting a terminating carrier from the rule prohibiting any charge for performing this service, upon the condition that no charge be imposed in excess of variable cost (35 cents per mile), is "deregulation." And of course, the third element of the car hire exemption—exemption of negotiated car hire agree-

[15] Of course, under the decision below, there will be no such "cost savings," since the market inefficiencies of the car hire rules will continue.

ments—would appear to be "deregulation" in any light.

It does not suffice to state, with the court of appeals, that the car hire exemption is "regulation" because it "shifted entitlements" among participants in the regulatory scheme rather than removing them (Pet. App. 61a). Were that the test, virtually all partial deregulation would be deemed "regulation" because the effect of a change in a regulatory scheme is almost always to shift entitlements among parties to the transaction.

The only sensible, non-circular test for "deregulation" is whether the result is what Congress intended—an increase in the degree to which market forces determine the deployment of resources. There can be no doubt that the partial car hire exemption moves in this direction. The exemption will allow the demand for boxcars to determine compensation levels (Pet. App. 132a, 181a) and will impose the costs of empty car movements on those who demand them (*id.* at 131a, 177a). Perhaps most important, it will create an incentive for the parties to enter into their own agreements. Even Chairman Taylor, in dissent, described the car hire decision as an "effort to graft a little 'free market' onto regulation" (*id.* at 145a).

The decision below conflicts with this Court's decisions in *ICC* v. *American Trucking Ass'ns*, No. 82-1643 (June 5, 1984), and *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975). In *American Trucking Ass'ns*, the Court held that the Commission has the authority to impose conditions on the approval of a proposed tariff, even where the effect of those conditions is to create an additional remedy not expressly provided by Congress. Slip op. 12-13. The same logic would apply to exemptions. The Commission characterized its car hire decision as "a partial

exemption from regulation subject to conditions" (Pet. App. 136a). It exempted terminating carriers from portions of the car hire rules, subject to the condition that they charge offsetting storage fees no greater than the per diem charges and return fees no greater than variable cost. Under the principle of *American Trucking Ass'ns*, that action is within the Commission's authority under 49 U.S.C. 10505. See also *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); *United States* v. *Chesapeake & O. Ry.*, 426 U.S. 500 (1976).

In *Oregon Pacific Industries*, the Court held that a change in demurrage charges for railway cars held at reconsignment points by terminating carriers for more than five days was a "suspen[sion]" of "rules, regulations, or practices then established with respect to car service," within the meaning of Section 1(15) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1(15). 420 U.S. at 186 (citation omitted). The Court did not indulge in semantical exercises with the term "suspension," such as were performed below with regard to the similar term "exemption"; rather, the Court upheld the Commission's decision on the ground that it was "not an unreasonable method" of achieving the congressional purposes. 420 U.S. at 191. Here, the Congress intended to replace regulation with "greater reliance on the marketplace" (§ 2(9), 49 U.S.C. 10101a note). The car hire exemption is "not an unreasonable method" of furthering that end.

CONCLUSION

The petitions for a writ of certiorari should be granted and the cases consolidated for argument.

Respectfully submitted.

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JANUARY 1985

STATUTORY APPENDIX

1. 49 U.S.C. 10101a provides:

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

2. 49 U.S.C. 10505 provides:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a

person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transportation or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

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Nos. 84-550 and 84-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
BRAE CORPORATION, *et al.*,
Respondents.

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT CANADIAN RAILROADS IN OPPOSITION

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QUESTION PRESENTED

The questions presented in the petitions for certiorari, and in the brief for the United States, concerning the car hire rules are based on a totally flawed interpretation of the agency action at issue and the decision of the court below. The Interstate Commerce Commission ("Commission") did not decrease regulation of boxcar car hire services, but rather imposed a totally new regulatory scheme.* The Court of Appeals did not "substitute its economic analysis for that of the agency"; the court correctly found that the Commission had exceeded its statutory authority because the governing statute involved is limited to the power to deregulate. The attacks of the Commission, Conrail, and the Solicitor General on the decision of the Court of Appeals are wholly without merit.

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* The Petitions for Certiorari filed by the Commission and by the Consolidated Rail Corporation ("Conrail") seek review of those portions of the decision of the Court of Appeals concerning the lawfulness of the exemption as it applies to joint rates and car hire (Commission Petition at 6-18; Conrail Petition at 13-24). In the instant brief the Canadian railroads (Canadian National Railway Company and Canadian Pacific Limited) will address only the requests for review of the car hire issue. Other parties will separately file reply briefs addressing the requests for review of the decision of the Court of Appeals regarding the exemption of joint rates.

The Canadian railroads, however, feel compelled to comment upon the Solicitor General's characterization of the decision of the Commission as involving, *inter alia*, an "exemption of boxcar traffic from maximum rate regulation." *See* Brief for United States, at 5-6, 9. This characterization evidences an ignorance of the Commission's statutory powers and the scope of the Commission decision at issue here. Under the Interstate Commerce Act, the Commission has jurisdiction to find rates unreasonably high or unreasonably low. *See* 49 U.S.C. § 10701a(b)-(c). The Commission exempted boxcar traffic not merely from "maximum rate regulation," but from *all* rate regulation—including regulation of rates that the Commission might otherwise find to be unreasonably low. *See* App. 121a-122a, 126a, 152a.

The question presented for review is:

Whether, by prescribing regulations that confer on rail carriers, for the first time, the right to assess specified car hire charges against other rail carriers without their consent and without regard to market forces, the Commission exceeded its authority under Section 10505 of the Interstate Commerce Act (49 U.S.C. § 10505), which empowers the Commission to "exempt" rail carrier transportation from regulation under certain specified circumstances.

LISTING REQUIRED BY RULE 28.1

The parent companies, divisions, affiliates and subsidiaries of the Canadian Railroads are set forth below:

CANADIAN NATIONAL RAILWAY COMPANY

CN Rail
CN Enterprises
CN Investment Division
Autoport Limited
Canac Consultants Limited
The Canada and Gulf Terminal Railway Company
Canadian National Express Company
Canadian National Hotels (Moncton) Ltd.
Canadian National Railway Company
The Canadian National Railway Securities Trust
Canadian National Steamship Company, Limited
Canadian National Telegraph Company
Canadian National Transfer Company Limited
Canadian National Transportation, Limited
The Canadian Northern Quebec Railway Company
Canat Limited
Canaven Limited
Chalut Transport (1974) Inc.
Chapman Transport Limited
CN Exploration Inc.
CN (France) S.A.
CN Marine Inc.
CNM Inc.
CN Tower Limited
CN Tower Restaurants Ltd.
CN Transactions Inc.
Coastal Transport Limited
Cronin Transport Limited
Detroit, Toledo and Ironton Railroad Company
Domestic Two Leasing Corporation
Domestic Three Leasing Corporation
Domestic Four Leasing Corporation

Duluth, Winnipeg and Pacific Railway Company
Empire Freightways Limited
Grand Trunk Corporation
Grand Trunk Land Development Corporation
Grand Trunk Radio Communications, Inc.
Grand Trunk Western Railroad Company
The Great North Western Telegraph Company of Canada
Husband International Transport (Ontario) Limited
Husband Transport Limited
Midland Superior Express Limited
The Minnesota and Manitoba Railroad Company
The Minnesota and Ontario Bridge Company
Mount Royal Tunnel and Terminal Company, Limited
The Northern Consolidated Holding Company Limited
Northwestel Inc.
116334 Canada Inc.
116335 Canada Inc.
The Quebec and Lake St. John Railway Company
Royal Transportation Limited
Swna River-The Pas Transfer Ltd.
Terra Nova Telecommunications Inc.
The Toronto-Peterborough Transport Company, Limited
Transport Husband (Quebec) Inc.
Transport Route Canada Inc.
The Belt Railway Company of Chicago
Canaprev Inc.
Central Vermont Railway, Inc.
Chicago and Western Indiana Railroad Company
Compagnie de gestion de Matane Inc.
Computer Sciences Canada, Ltd.
East Yard Development Ltd.
E I D electronic Identification Systems Ltd.
Eurocanadian Shipholdings Limited
Hailifax Industries (Holdings) Limited

Halterm Limited
Intercast S.A.
Lakespan Marine Inc.
Les Enterprises Bussieres Ltee
The Public Markets, Limited
Seabase Limited
Shawinigan Terminal Railway Company
Societe du port ferroviaire de Baie Comeau-Hauterive

CANADIAN PACIFIC LIMITED

Canadian Pacific Enterprises Limited
The Algoma Steel Corporation, Limited
AMCA International Limited
Cominco Ltd.
Great Lakes Forest Products Limited
PanCanadian Petroleum Limited
Steep Rock Resources Inc.
Maple Shipping Company (U.K.) Limited—
(A subsidiary of wholly-owned Canadian Pacific Steamships, Limited)
Canscade Pipe Line Limited
The Dominion Atlantic Railway Company
The Kingston and Pembroke Railway Company
The Lake Champlain and St. Lawrence Junction Railway Company
The Lake Erie and Northern Railway Company
Manitoba and North Western Railway Company of Canada
Massawippi Valley Railway Company
The Montreal and Atlantic Railway Company
Ontario and Quebec Railway Company
The St. Lawrence and Ottawa Railway Company
Soo Line Railroad Company
Toronto, Grey and Bruce Railway Company
Telesat Canada
The Toronto Terminals Railway Company
Trailer Train Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-550 and 84-867

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BRAE CORPORATION, *et al.*,
Respondents.

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT CANADIAN RAILROADS IN OPPOSITION

STATUTES INVOLVED

The pertinent portions of 49 U.S.C. § 10505 are set forth at Appendix G of the Commission's Petition (App. 217a).[1] Pertinent portions of 49 U.S.C. § 11122 are set forth at pages 4 and 5 of Conrail's Petition.

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[1] In the instant brief, the abbreviation "App." will be used to refer to the Appendix filed by the Commission in conjunction with its petition for certiorari.

STATEMENT OF THE CASE

The Decisions of the Commission

On May 22, 1981, the Consolidated Rail Corporation ("Conrail") petitioned the Interstate Commerce Commission ("Commission") for an exemption under section 10505 of the Interstate Commerce Act (49 U.S.C. § 10505) from regulation for all transportation that Conrail provides in boxcars. As originally proposed, the exemption would have encompassed all regulated aspects of Conrail's boxcar movements (App. 105a). These aspects included not only freight rates that carriers charge shippers for boxcar transportation, but also the rental (car hire) rates paid by railroads for the use of one another's boxcars.

At the time Conrail filed its proposal, car hire rates were based on a formula prescribed by the Commission. This formula distributed car ownership costs evenly over the days that a car is in use, regardless of whether the car is on the tracks of the railroad that owns it, or on another railroad's tracks (App. 127a). The owner of the car (the originating carrier) collected the prescribed rental charge (sometimes known as the per diem rate) for each day that the car was on another carrier's lines, even after the car had been unloaded, and regardless of whether the car stood idle on the other carrier's lines, was reloaded for return movement, or returned empty (App. 163a).[2] On the other hand, the railroad over which the boxcar travels (the destination carrier) had no authority to assess charges against the originating carrier for the storage or return of the boxcar.

In response to Conrail's petition, the Commission initiated a rulemaking proceeding. The Commission invited public comments not only on the petition of Conrail, but also on the broader issue of whether the Commission

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[2] The "per diem rate" is composed of a daily rental charge and a per-mile rental charge. *See* App. 163a, 178a; *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 716, 721 (1977).

should grant a partial or complete exemption of all boxcar traffic nationwide (47 *Fed. Reg.* 4100).

More than 200 comments were filed in response to Conrail's petition, most of them opposing the proposed exemption. Parties filing comments included the Canadian Railroads, Canadian National Railway Company ("CN") and Canadian Pacific Limited ("CP").[3] CN and CP were concerned with the outcome of the Commission proceeding because of the critical role that boxcar transportation plays in the flow of commerce between Canada and the United States. International movements account for one-third of the traffic handled by CN and CP (App. 83a-84a). Boxcar traffic accounts for nearly half of CN's international rail traffic, and for approximately one-third of the carloads handled by CP in international service.

In response to the various comments filed by the parties, Conrail offered a modified proposal. With respect to car hire, Conrail proposed that the Commission authorize all railroads to take the following actions with respect to boxcar equipment use: (1) assess charges not exceeding 35 cents per mile for the empty movement or return of cars where performed at the direction of the car owner; (2) impose storage fees (not exceeding the per diem rate) on the car owner for boxcars that have been empty for more than seventy-two hours;[4] and (3) in lieu of these charges and per diem rates, negotiate bilateral agree-

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[3] CN is owned by the Government of Canada, while CP is a privately held Canadian corporation (App. 83a).

[4] Although Conrail characterizes the Commission's decision as merely "allow[ing] destination railroads to cease paying car hire for empty boxcars stopped on their lines with the owner's consent" (Conrail Petition at 10 n.14), the Commission made clear in its decisions that it was authorizing carriers to impose storage fees to "offset" or "reclaim" per diem charges. *See, e.g.*, App. 128a, 135a, 136a, 207a. The Solicitor General agrees that the Commission authorized carriers to "charge offsetting storage fees no greater than the per diem charges" (Brief for United States, at 29). *See also* Commission Petition at 14-15.

ments governing car hire rates, empty movements, and storage (App. 128a, 152a, 207a). Under the revised proposal, Commission regulation of car hire and car service would not otherwise be affected. Thus, the Commission would continue to prescribe the per diem rates assessed by originating carriers, absent an agreement between that carrier and the destination carrier (App. 128a). Conrail also proposed that the Commission retain jurisdiction over mandatory interchange of equipment, reciprocal switching, car supply, and freight car pooling agreements (App. 106a, 152a).

On April 29, 1983, the Commission adopted Conrail's modified car hire proposal on a national basis (App. 105a). With respect to car hire, the Commission found that the Conrail proposal would encourage more efficient utilization of boxcars and reduce the incentive under the current boxcar interchange system for carriers to load their own cars while returning other carriers' cars empty (App. 127a-135a). Thus, the Commission authorized carriers to impose storage fees and empty return charges (and to make bilateral car compensation agreements), and retained jurisdiction over other aspects of car hire and car service, including the prescription of per diem rates (App. 134a-135a).

In adopting Conrail's car hire proposal, the Commission stated that it was not relying solely on Section 10505, because of its doubts concerning the extent of its jurisdiction under that statute (App. 136a):

> "Our order adopting Conrail's modified proposal is a partial exemption from regulation subject to conditions. *We recognize, however, that it could be construed in some respects as being new regulation. To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122.* Under that section, we are to encourage not only the purchase and acquisition of

freight cars, but also their efficient use. In addition to car compensation, our regulations may include the other terms of any arrangement for use of freight cars. Storage reclaim and return charges clearly constitute such 'other terms' and will serve to encourage efficient boxcar use. Section 11122 authorizes, but does not require, the Commission to prescribe car hire charges. Consequently, it permits us to make the prescribed car hire optional and allow the substitution of bilateral car hire agreements (as we have already done to some extent in Ex Parte No. 334 (Sub-No. 4)). In our supplemental notice published June 25, 1982 (47 F.R. 27573), we fully informed the public that we were considering a proposal to authorize the imposition of storage reclaim and return charges on boxcars and to allow optional bilateral car hire agreements; we have received ample public comment on the proposal. Consequently, *whether Conrail's proposal with respect to boxcar equipment charges is viewed as an exemption or an affirmative regulation, we may properly adopt it in this proceeding.*" (Emphasis added.)

Following issuance of its decision (known as *Boxcars I*), the Commission received numerous petitions for reconsideration. In October 1983, the Commission issued a decision (*Boxcars II*) denying the petitions (App. 155a). In its decision, the Commission reiterated that absent a contrary agreement between the parties, "the prescribed car hire rates continue to apply to empty movements, whether or not empty return charges are imposed by the carriers handling the car," and "cars stored off line are subject to a reclaim or cancellation of the applicable car hire for the storage period, not to the imposition of other storage charges" (App. 165a). In addition, the Commission *withdrew* any reliance on Section 11122 as authority for its actions, because the failure of its notice of proposed rulemaking to cite that statute "may raise substantial legal questions" (App. 167a).

The Decision of the Court of Appeals

On review by the Court of Appeals for the District of Columbia Circuit, the Commission's decision was affirmed in part, vacated in part, and remanded (App. 15a, 91a-93a). The court vacated the decision of the Commission to exempt boxcar rates from regulation insofar as it applied to joint rates and to the Alaska Railroad, but held that the Commission had acted lawfully in deregulating other freight rates (App. 20a-50a, 69a-83a).

The Court of Appeals also held that the Commission had exceeded its statutory authority under Section 10505 insofar as the car hire component of its decision was concerned: "[T]he ICC car hire decision was the promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a) and therefore must be vacated" (App. 93a). In its analysis, the court first reviewed the language, legislative history, and purpose of Section 10505, and concluded that Congress limited the Commission's powers under that statute "to the power to deregulate; to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry" (App. 59a).

The court then turned to the issue of whether the car hire decision constituted an "exemption" within the meaning of Section 10505. It concluded that "the Commission here was *not* deregulating, but rather was imposing a new regulatory framework over the car hire relationship" (App. 60a) (emphasis in original). The Commission had "placed two significant bargaining weapons in the arsenal of the destination carrier"—storage fees and empty return charges—and the destination carrier was entitled to assess these charges regardless of market forces (*id.*). At the same time, however, the Commission had retained jurisdiction to prescribe per diem rates (Pet. 60a-61a). By contrast, if the Commission had truly intended to deregulate car hire, it would have sim-

pay provided that the parties determine all of these matters through negotiations, and that no party would enter negotiations with such entitlements. The Commission's actions therefore did not represent deregulation, but merely altered the bargaining relationship between the parties (Pet. 60a-61a).

Because it found that the Commission's decision concerning car hire did not constitute deregulation, the Court of Appeals concluded that the Commission lacked authority to take such action under Section 10505(a) (App. 68a). The court emphasized, however, that its decision applied only to the Commission's attempt to invoke Section 10505 as the source of its authority for regulations entitling carriers to assess storage fees and empty return charges. According to the court, Section 11122, which empowers the Commission to regulate the terms of car hire, may provide an adequate basis for precisely the car hire "package" that the Commission sought to implement, provided that the requirements of that statute are otherwise met (App. 65a-68a). Alternatively, if the Commission truly desires to leave the terms of car hire to market forces, it is authorized under Section 10505 to deregulate car hire completely by providing that such terms are to be determined by the carriers through bilateral agreements, without regulation, if the Commission can make the predicate findings under that section (App. 69a).

SUMMARY OF ARGUMENT

The Solicitor General's highly qualified support of the requests for review of the car hire issue amply demonstrates why the issue should *not* be reviewed by this Court. The Solicitor General considers the car hire issue to be of such limited importance that he recommends denial of the requests if this Court does not also review the joint rate issue (Brief for United States, at 26 n.14). As the Solicitor General recognizes, and as will be discussed be-

low, "The decision below appears to leave room for adoption of this regulation on remand under other [statutory] authority," and pending Commission proceedings concerning car hire "offer the Commission alternative means for accomplishing its objectives" (*id.*). Given the availability of statutory and procedural alternatives to the Commission, the decision of the Court of Appeals with respect to car hire does not present issues of sufficient importance to warrant consideration by this Court.

Despite the concessions of the Solicitor General, the Commission asserts that its petition for a writ of certiorari should be granted because "[t]his is a case of first impression concerning the appropriate role of court and agency in carrying out these broad new delegations of exemption power" (Commission Petition at 4). According to the Commission, the Court of Appeals substituted its economic judgment for that of the Commission, misread the Commission's decision, and impermissibly circumscribed the Commission from addressing car supply decisions (*id.* at 14-18). The Commission is incorrect.

As its opinion makes clear, the Court of Appeals did not "substitute its economic judgment for that of the Commission," but simply interpreted the scope of Section 10505 of the Interstate Commerce Act. Following established rules of statutory construction, the court held that the "exemptions" that the Commission is authorized to grant under this statute must constitute deregulation—that is, a lessening of regulatory burdens. This interpretation of the statute is plainly correct, and neither the Commission nor Conrail appears to question it.

The protests of the Commission and Conrail notwithstanding, the Court of Appeals was also clearly correct in holding that the car hire aspect of the Commission's decision was not an "exemption" and was therefore beyond the scope of the Commission's authority under Section 10505. As the court recognized, the Commission imposed a new regulatory framework on car hire by conferring

on destination carriers, for the first time, the right to assess storage fees and empty return charges. Under this framework no carrier may assess charges with respect to car hire except those authorized by the Commission, and the maximum levels of those charges are prescribed by the Commission. This clearly is not "deregulation."

Both Conrail and the Commission (which expressed uncertainty over the issue in its *Boxcars I* decision) appear to argue that the car hire aspect of the Commission's decision constitutes an "exemption" because carriers can "circumvent" the authorized car hire charges by raising their freight rates, which have been deregulated. This position is a *post hoc* rationalization that is devoid of logic. It ignores not only the nature of the Commission's decision, but also the Commission's finding that carriers are constrained in their ability to raise freight rates by competitive forces.

Although Conrail and the Commission attempt to demonstrate a conflict between various decisions of this Court and the decision of the Court of Appeals, no such conflict exists. In none of the decisions cited by the Commission did this Court hold that reviewing courts must accord the Commission unquestioned and unlimited deference when the Commission is attempting to remedy car supply problems. In each decision this Court adhered to the principle that an agency must act within the scope of its statutory authority. Here, in a careful and searching analysis, the Court of Appeals determined that the Commission had exceeded the scope of its statutory authority. Its conclusion was plainly correct, and should not be reexamined.

Finally, contrary to the Commission's contention, the Court of Appeals did not "foreclose" the Commission from acting to alleviate car supply problems. The Court of Appeals merely held that the Commission lacked authority under Section 10505 to take the actions at issue here with respect to car hire. As the Solicitor General concedes, the

court noted that the Commission may be able to impose such regulation under Section 11122 of the Interstate Commerce Act, or (if the Commission wishes to leave car hire matters entirely to market forces) may deregulate these matters entirely under Section 10505, provided that the Commission can make the findings required by these statutes. Although Conrail suggests that the decision of the Court of Appeals will "severely limit" the exemption authority of the Commission, the decision rejects only the attempt of the Commission to invoke Section 10505 as a source of authority to entitle carriers to assess storage fees and empty return charges.

Because the decision of the Court of Appeals is so clearly correct, and leaves the Commission free to take action under other statutes (or to grant true exemptions), the petitions for certiorari should be denied.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS WAS CLEARLY CORRECT

This case involves the construction of a particular statute—Section 10505 of the Interstate Commerce Act. Notwithstanding the Commission's arguments to the contrary, it raises no new issues concerning the roles of reviewing courts and agencies.[5] The principles governing

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[5] The instant case does not mark the first occasion on which the scope of Section 10505 has been interpreted. In two previous cases, the Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit affirmed exemptions by the Commission for the most part, but held that the Commission had exceeded its authority under Section 10505 in certain respects. *See McGinness* v. *ICC*, 662 F.2d 853 (D.C. Cir. 1981) (affirming ICC decision to exempt "designated operators" from merger and interlocking directorate provisions of Interstate Commerce Act, but holding that ICC exceeded its authority in exempting operators from labor protection requirements of Act); *American Trucking Associations* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (affirming ICC decision to deregulate transportation provided by rail carriers in connection

the relationship between courts and agencies have been firmly established by this Court. The Court of Appeals followed those principles in this case, and its interpretation of the statute was clearly correct.

The Commission and Conrail basically argue that the Court of Appeals should have deferred to the Commission's interpretation of Section 10505 as empowering the Commission to entitle rail carriers to assess new charges against each other, regardless of market forces and without the consent of the other carrier. This argument is incorrect. An agency may not exceed its statutory authority. *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977); *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 393 (1974). This Court has stated that an agency's construction of the statute that it is charged to administer is not binding on a reviewing court:

> "[T]he courts are the final authorities on issues of statutory construction, . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.'"

Volkswagenwerk v. *FMC*, 390 U.S. 261, 272 (1968), *quoting FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). *See also FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

Although a reviewing court is required to give some deference to an agency's interpretation of the statute under which it purports to operate, that deference is constrained by the obligation of the reviewing court "to

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with trailer-on-flatcar and container-on-flatcar service, but holding that ICC acted arbitrarily in including Alaska Railroad within exemption). The Commission did not seek review of these decisions by this Court. In *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia Circuit affirmed a decision of the Commission to grant a partial exemption to state governments proposing to operate abandoned rail lines, pursuant to Section 10505.

honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979); *Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). Thus, a reviewing court is not required to defer to an administrative construction of a statute that is inconsistent with its language and purpose. *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

The Court of Appeals followed those principles in this case. As required, the court first examined the language of Section 10505(a). *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. at 405; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). That statute provides, in pertinent part (49 U.S.C. § 10505(a)):

> "In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or transaction or service when the Commission finds that the application of a provision of this title—
>
> (1) is not necessary to carry out the transportation policy of this title and
>
> (2) . . . the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power."

The Court of Appeals first determined that "the plain meaning of the word 'exempt' connotes a lessening of regulation, a decrease in regulatory burdens" (App. 57a-58a). This analysis was consistent with rulings of this Court that the words of a statute should be given their ordinary meaning.[6]

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[6] *See, e.g., Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981); *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966).

After determining the ordinary meaning of the term "exempt," the Court of Appeals then conducted an extensive examination of the legislative history of the statute (App. 58a-59a). This approach was again proper, for this Court has held that in construing a statute a court must interpret the words of the statute in light of the purposes that Congress sought to achieve. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S 600, 608 (1979).

The numerous portions of the legislative history cited by the Court of Appeals clearly demonstrate that Congress intended the Commission to use its exemption powers only to deregulate and to remove regulatory burdens (App. 58a-59a). The Court of Appeals properly placed particular reliance on the Conference Report on the Staggers Act regarding the exemption provision. In cases involving statutory construction, the conference report on the statute is entitled to great weight. *National Association of Greeting Card Publishers* v. *U.S. Postal Service*, 103 S. Ct. 2717, 2731 n.28 (1983). The Conference Report fully supports the interpretation of Section 10505 by the Court of Appeals:

> "The bill permits exemptions *wherever regulation is not needed* to prevent abuses of market power, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where *reduced regulation* is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine *where they can be deregulated* consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete *exemptions from remaining regulation.* The conferees anticipate that through the exemption process *the Commission will eventually reduce its exercise of authority* to instances where regulation

> is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. *Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed* and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *H. Rep. No.* 96-1430, 96th Cong., 2d Sess. 105 (1980). (Emphasis added.)[7]

Neither the Commission nor Conrail appears to contest the Court of Appeals' interpretation of the exemption statute as authorizing only deregulation. Instead, they argue that the court was wrong in characterizing the car hire decision as a new regulatory framework, rather than deregulation. The Commission and Conrail appear to be arguing that the decision amounts to deregulation because, even if a destination carrier assesses storage fees or empty return charges, carriers can adjust their freight rates—which have been deregulated—in reaction to these charges. The originating carrier can recover the cost of these charges by increasing its freight rate; if this occurs, the destination carrier will be required to decrease

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[7] Congress expressed the same deregulatory intent when it enacted the first version of the exemption statute in 1976, as part of the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, § 207, 90 Stat. 31, 42 (1976). The Senate committee report on the bill stated that "the power to exempt from regulation in whole or in part will enable the Commission to commit its limited resources in areas where they are most needed, by enabling it to deregulate those areas which have no significant bearing on the overall regulatory scheme." *S. Rep. No.* 94-499, 94th Cong., 1st Sess. 53 (1975). The House committee report stated that the bill "aid[s] the railroads' competitiveness" by providing "that the ICC can exempt from regulation those rail matters that do not affect the national transportation policy." *H. Rep. No.* 94-725, 94th Cong., 1st Sess. 56 (1975). The exemption statute was recodified in 1978 as Section 10505. The current version of Section 10505 was enacted as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 213, 94 Stat. 1895, 1912-1913. *See American Trucking Associations* v. *ICC*, 656 F.2d 1115, 1118-1120 (5th Cir. 1981).

its freight rate to preserve the business of the shipper (Commission Petition at 16; Conrail Petition at 21 n.33). In addition, when the car hire market is strong, originating carriers can increase their revenues by increasing their freight rates or by entering into agreements with other carriers (Commission Petition at 16). Thus, they argue, the prescribed per diem "can easily and lawfully be circumvented," to the extent the market allows (*id.*). In addition, according to Conrail, carriers can respond to the assessment of empty storage charges by cancelling joint boxcar rates, as they are free to do under the *Boxcars* decision (Conrail Petition at 21 n.33).

These arguments are without merit. First, Conrail and the Commission are advancing an explanation that was not even suggested in prior decisions of the Commission. In *Boxcars II*, the Commission asserted that its decision was an exemption insofar as car hire was concerned for the following reason (App. 167a):

> "[I]t allows carriers to take actions that are inconsistent with the terms of compensation that we prescribe for freight car use under 49 U.S.C. [§] 11122. . . . That is, car users may impose empty return charges and cease payment of car hire on stored cars. Car users and owners may depart from prescribed car hire in other ways if they make bilateral agreements. . . . The exemption is partial because it allows only specified types of departures from the prescribed terms."

The Commission later repeated this justification when it denied petitions for a stay pending judicial review (App. 197a).

The explanations now offered by the Commission and Conrail totally differ from the rationale set forth in these decisions.[8] For that reason alone, such explanations

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[8] As the extensive quotation set forth in the Commission's Petition for Certiorari indicates, in *Boxcars II* the Commission discussed the ability of railroads to adjust their deregulated freight rates in

should be given no weight. As this Court has held, appellate counsel's *post hoc* rationalizations for the action of an agency are not acceptable; the action must be upheld, if at all, on the basis offered by the agency in its decision. *See Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2870 (1983); *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 539 (1981).

Second, the reliance of the Commission and Conrail on the use of rate increases is inconsistent with the finding of the Commission that continued regulation of freight rates is not necessary to protect shippers from abuses of market power. In *Boxcars I*, the Commission found that carriers are constrained in their ability to raise freight rates by several factors, particularly by the presence of pervasive truck competition (App. 20a-23a, 113a-121a). The arguments of the Commission and Conrail ignore this finding and assume that carriers have unlimited freedom to raise their freight rates to recoup car service charges.

Third, the Court of Appeals was clearly correct in finding that the action of the Commission did not constitute an exemption. The court was not required to defer to the Commission's construction of its decisions; those decisions must speak for themselves. *See FPC* v. *Texaco, Inc.*, 417 U.S. at 395-397.

As the Court of Appeals stated, the Commission's actions did not constitute an "exemption" because the Com-

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reaction to the assessment of empty return charges (Commission Petition at 16). The Commission, however, did not purport to offer this as a justification for its conclusion that the car hire portion of its decision constituted deregulation; the quoted discussion was a response to concerns of certain railroads that the assessment of storage fees and empty return charges "will result in vast transfers of revenue from car owners that originate traffic to delivering carriers" (App. 175a-176a). The Commission explained why it considered its actions an exemption in an earlier, separate portion of the same decision (App. 167a).

mission conferred on carriers new entitlements—the right to charge storage fees and empty return charges—irrespective of market forces and without the consent of the other carrier (App. 60a). This did not reduce regulation, but instead imposed a new regulatory framework on the economic relationship between the destination carrier and the originating carrier (App. 61a):

> "Prior to the *Boxcars* decisions, the originating carrier entered negotiations against a background in which it had, in essence, a statutory entitlement equivalent to the amount of the per diem. The destination carrier had no such entitlement and, in fact, confronted a situation in which, absent agreement, it would have to bear the cost of returning the boxcar. Under the *Boxcars* decisions, the originating carrier enters negotiations against a background in which it has a statutory entitlement equivalent to the amount of per diem. The destination carrier, however, now has a statutory entitlement equivalent to the storage fees and the empty return charges. In striking contrast, had the Commission actually deregulated car hire, then neither party would enter negotiations with a statutory entitlement and the market alone would establish the relative bargaining positions of the parties. It thus becomes obvious that the Commission has shifted entitlements to a point that represents neither deregulation nor the pre-*Boxcars* design. Thereby, the Commission has fixed the initial relative bargaining positions of the parties at a point that does not necessarily reflect either the pre-*Boxcars* scheme or what market factors otherwise might dictate."

Furthermore, the Commission has imposed regulation on the new rights that it has created. As the Commission stated in *Boxcars II*, in assessing storage fees and empty return charges, "carriers may not exceed certain limits . . . That is, return charges are subject to a stated ceiling [35 cents per mile], and stored cars are subject only to car hire reclaims [*i.e.*, may not exceed per diem rates]

and only after 3 days" (App. 167a). Thus, after the Commission's decision, carriers may impose only those charges authorized by the Commission, and the maximum levels of those charges are prescribed by the Commission. This system cannot remotely be considered an "exemption" or "deregulation."

As stated above, the Commission and Conrail nonetheless assert that the Court of Appeals misinterpreted the decisions of the Commission, because under "the total exemption package," carriers can "circumvent" or recoup the various charges (including per diem) by adjusting their freight rates, which have been deregulated. Stated otherwise, they argue that the car hire decision is an exemption because carriers can effectively render the charges meaningless by adjusting their deregulated rates. Conrail advances the additional rationalization that carriers can exercise their newly-granted freedom to cancel joint rates in response to such charges.[9] These arguments are patently illogical. Newly created rights to assess storage fees and empty return charges do not become "deregulation" merely because the carrier against whom these charges are assessed is later able to recoup its costs by increasing freight rates or because it can retaliate by cancelling joint rates.

The Solicitor General, declining to endorse the arguments of the Commission or Conrail, argues that the Court of Appeals engaged in "pure semantics" in finding that the Commission's actions did not constitute an exemption. The decision of the Commission, he argues, had the "effect" of exempting destination carriers from their obligation to pay per diem charges and "from the rule prohibiting any charge for [returning an empty boxcar

[9] The Court of Appeals vacated as arbitrary and capricious the portion of the Commission's decision exempting joint rates from regulation, because the Commission had failed to consider the effects of such an exemption on the division of joint rates between large and small carriers (App. 37a-50a, 92a).

upon request], upon the condition that no charge be imposed in excess of variable cost (35 cents per mile)" (Brief for United States, at 27). He further asserts that exemption of negotiated car hire agreements "would appear to be 'deregulation' in any light" (*id.* at 27-28).

The strained reasoning of the Solicitor General is itself an exercise in "pure semantics." The decision of the Commission speaks for itself. The Commission did not purport to exempt carriers from their obligation to pay per diem charges. Under the decision destination carriers must continue to pay such charges, but now are entitled to assess both separate storage fees not exceeding the per diem charges and empty return charges not exceeding 35 cents per mile. The Solicitor General concedes that these actions "would appear to be 'regulation'" (*id.*). By suggesting that these actions constitute deregulation because they "could be characterized as" an exemption from prior rules, the Solicitor General elevates semantics over substance. Under his reasoning, the imposition of a new regulatory scheme is an "exemption" because it "exempts" carriers from the prior regulatory scheme. In enacting Section 10505, Congress surely did not intend such an illogical result.

Assuming it can make the required statutory findings, the Commission has the authority to prohibit assessment of per diem charges, and under certain provisions of the Interstate Commerce Act it may have the authority to promulgate regulations entitling carriers to impose storage fees and empty return charges. And, in appropriate circumstances, it can deregulate car hire altogether and leave the determination of charges exclusively to negotiated private agreements between carriers.[10] What the

[10] Although the Solicitor General characterizes "exemption of negotiated car hire agreements" as "the third element of the car hire exemption," the Commission is not required to exercise its powers under Section 10505 in order to authorize such agreements. The Commission can accomplish this result simply by abolishing

Commission *cannot* do is to use Section 10505 as a means of conferring new rights on carriers to assess new charges. Such an action cannot reasonably be "characterized" as an exemption.[11]

Finally, the Commission and the Solicitor General argue that the Court of Appeals ignored the ability of carriers under the "exemption" to circumvent car hire charges by making bilateral agreements (Commission Petition at 16; Brief for United States, at 27-28). As the Court of Appeals recognized, however, this argument again overlooks the nature of the Commission's action: "Granting destination carriers additional statutory entitlements vis-a-vis originating carriers under a scheme of continued regulation, however, does not metamorphize into a deregulatory exemption simply because it may encourage some carriers to enter bilateral agreements" (App. 62a).

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its existing regulations concerning car hire rates, which were promulgated pursuant to 49 U.S.C. § 11122. As the Commission stated in *Boxcars I*, "Section 11122 authorizes, but does not require, the Commission to prescribe car hire charges" (App. 136a). Even before it issued the *Boxcars* decisions, the Commission authorized carriers to negotiate bilateral car hire reductions below prescribed per diem rates. *See* Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroads Per Diem Levels*, 364 I.C.C. 291 (1980).

[11] The Solicitor General is also incorrect in asserting that the car hire decision will "increase the degree to which market forces determine the deployment of resources" (Brief for United States, at 28). It is not "the demand for boxcars," but the new regulatory scheme imposed by the Commission, that will determine compensation levels. Moreover, the Solicitor General's statement that the new charges "will impose the costs of empty car movements on those who demand them" (*id.*), simply begs the question. Obviously those who demand empty car movements will pay the "costs" authorized under the Commission's decision; the issue is whether the "costs" constitute an "exemption" from regulation within the meaning of Section 10505.

II. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The Commission and Conrail argue that the decision of the Court of Appeals is inconsistent with prior decisions of this Court. The Commission points to three decisions involving Commission attempts to alleviate national car supply problems: *ICC* v. *Oregon Pacific Industries*, 420 U.S. 184 (1975); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); and *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973). *See* Commission Petition at 17. The Commission's reliance on these cases, however, is misplaced.

None of the cases cited by the Commission involved Section 10505 or an attempt by the Commission to exempt traffic from regulation. In each case, the Commission was imposing *additional regulation* pursuant to the Esch Car Service Act of 1917.[12] In *Oregon Pacific* and *Allegheny-Ludlum*, this Court held that the Commission had not exceeded its authority under the Esch Act in taking the

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[12] In *Oregon Pacific*, the Commission promulgated an emergency car service order, pursuant to Section 1(15) of the Interstate Commerce Act (now recodified as 49 U.S.C. § 11123), that limited the holding time of lumber cars at reconsignment points to five working days. Under the order, any shipper holding the car at such points for a longer period lost its reconsignment privilege and was required to pay the sum of the rates from origin to holding point, and from holding point to the destination. *Allegheny-Ludlum* involved two car service rules of the Commission that had the effect of requiring that, after unloading, freight cars be returned in the direction of the lines of the road owning the cars. The *Florida East Coast* case involved the establishment of incentive per diem rates by the Commission. The actions of the Commission at issue in *Allegheny-Ludlum* and *Florida East Coast* were taken pursuant to Section 1(14)(a) of the Interstate Commerce Act—now recodified as 49 U.S.C. § 11122. As described above, in the instant case, the Commission has disavowed its earlier reliance on Section 11122 in establishing the car hire "exemption."

actions at issue.[13] In *Florida East Coast Railway*, this Court held that in establishing incentive per diem rates, the Commission had complied with the requirements of the Esch Act that any action under the statute be taken only "after hearing," and that the Commission proceedings were not governed by Sections 556 and 557 of the Administrative Procedure Act (410 U.S. at 234-246).

Contrary to the Commission's suggestion, this Court did not hold in *Oregon Pacific*, *Allegheny-Ludlum*, or *Florida East Coast* that the Commission has *carte blanche* authority to take whatever actions it deems necessary to alleviate car supply problems. This Court merely held that the specific actions of the Commission at issue fell within the scope of its powers under the particular statutes on which the Commission relied. Implicit in these decisions was the long-established principle that an agency may not exceed its statutory authority. The Court of Appeals followed that principle in this case when it correctly found that the Commission's decision with respect to car service was not an "exemption" within the meaning of Section 10505.

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[13] The Solicitor General also asserts that the decision of the Court of Appeals conflicts with *Oregon Pacific*, because in the latter case this Court held that an order of the Commission requiring "local" freight rates, rather than the former demurrage charges, to be assessed, constituted a "suspension" of rules, regulations, or practices then established with respect to car service within the meaning of Section 1(15). Such reliance on *Oregon Pacific* is strained and misplaced. *Oregon Pacific* involved a decision of the Commission, in the exercise of its powers to regulate the national rail transportation system, to order "[t]he substitution of tariff rates already fixed and on file for the old demurrage rate" (420 U.S. at 191). This Court simply construed the term "suspension" in Section 1(15) as including the substitution of new regulation for the "old" regulation that had been suspended. That holding is plainly inapplicable here, where the language, purpose, and legislative history of Section 10505 demonstrate that the substitution of new regulation for old regulation is not an "exemption" within the meaning of the statute.

The Commission also asserts that the decision of the Court of Appeals "conflicts directly" with the holding of this Court in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981). *See* Commission Petition at 17. This argument misconstrues the facts and the holding of *WNCN*. Contrary to the Commission's contention, this Court did not hold in *WNCN* that "the FCC can use its general powers as an administrative agency to deregulate a significant area" (Commission Petition at 17). *WNCN* involved a decision by the FCC that it would not consider past or anticipated changes in a station's entertainment format when it rules on an application for removal or transfer of a radio broadcasting license. Although the applicable provision of the Communications Act authorizes the FCC to grant applications for license transfers or renewals only if it determines that the "public interest, convenience, and necessity" will be served thereby, the FCC concluded that this provision did not require it to review format changes. The FCC's decision did not constitute "deregulation," but was a reaffirmation of long-established policy (450 U.S. at 598-599).

In *WNCN*, after reviewing the FCC's decision, the longstanding interpretation of the Act by the FCC, and the language and legislative history of the Communications Act, this Court concluded that the FCC's interpretation of the "public interest standard" was not inconsistent with the Act (*id.* at 593-604). The Court reasoned that the FCC has broad discretion in determining what the "public interest" requires, and that the FCC had fulfilled its statutory obligation of providing a rational explanation for its decision (*id.* at 593-596, 603).

WNCN held only that the FCC had not acted inconsistently with its particular statutory obligations in promoting diversity in entertaining programming through market forces. This Court noted the obligation of an agency to act in accordance with its statutory duties (*id.* at 603). Here, by contrast, the statute on which the Com-

mission purportedly relied clearly did not authorize the new car hire regulations.

Both the Solicitor General and Conrail argue that the decision of the Court of Appeals is also inconsistent with the recent decision of this Court in *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. at 2458 (1984) (*"ATA"*). *See* Brief for United States, at 28-29; Conrail Petition at 22-23. In *ATA*, this Court held that the Commission had "discretionary authority" to reject an effective tariff that had been submitted in substantial violation of a rate bureau agreement, although the Interstate Commerce Act did not expressly provide for such authority, because tariff rejection "is closely and directly related to the Commission's express statutory powers and is designed to achieve objectives set forth for the Commission by Congress" (104 S. Ct. at 2460). The Court emphasized that its holding was narrow and was confined to the particular circumstances involved in that case (*id.* at 2460-2465).

ATA involved an attempt by the Commission, as part of its regulation of motor carrier rate tariffs, to exercise powers not expressly set forth in the Act in order to achieve the objectives of the Act. That situation does not exist here. Section 10505, the statute on which the Commission relied, expressly empowers the Commission to deregulate, provided that the Commission meets the requirements of that statute—including the requirement that the action taken constitute an "exemption" from regulation. Furthermore, as the Court of Appeals noted, Section 11122 specifically empowers the Commission to regulate the terms of car hire arrangements (including per diem rates, storage fees, and empty return charges) and sets forth the requirements that the Commission must meet in order to exercise that power (App. 67a-68a).[14]

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[14] The Solicitor General and Conrail also appear to rely on two other decisions of this Court in support of their argument that the Commission is empowered to grant a partial, as opposed to total,

In addition, the actions of the Commission here do not meet the two-part test of *ATA*. In order to lie within the Commission's discretionary power, the action must further a specific statutory mandate of the Commission, and must be "directly and closely tied to that mandate" (104 S. Ct. at 2466). Because the Commission's actions impose a new regulatory scheme over the car hire relationship, they plainly have no relationship to (and, indeed, frustrate) Section 10505's mandate of deregulation.[15]

Finally, Conrail professes to find a conflict between the decision of the Court of Appeals and "the decisions of this Court establishing the 'well-settled principles' that agencies have broad discretion to determine which of their

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exemption from regulation: *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-657 (1978); *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 509-515 (1976). However, the Solicitor General and Conrail misread the decision of the Court of Appeals. The court expressly stated that the Commission is empowered to adopt either partial or complete exemptions from regulation (App. 56a-57a). It simply held that the specific actions taken by the Commission did not constitute an "exemption" within the meaning of Section 10505. Moreover, *C&O* and *TAPS* are inapposite because, like *ATA*, they involved the issue of whether the Commission had the *implied* power to place conditions on its acceptance of proposed tariffs. Here, the Commission relied exclusively on the powers expressly set forth in Section 10505 as the source of its authority.

[15] Conrail alleges that the Court of Appeals "disregarded" 49 U.S.C. § 10321(a), which provides that enumeration of one power of the Commission in the Interstate Commerce Act does not exclude another power the Commission may have in carrying out the Act (Conrail Petition at 23). The Commission, however, did not purport to rely on this provision as a basis for its actions; it relied exclusively on Section 10505. In *ATA*, this Court cited Section 10321(a) only as the basis for rejecting the argument that the inadequacy of an agency's express authority is evidence that Congress did not intend for the agency to have more adequate powers (104 S. Ct. at 2467 n.11). *ATA* does not hold, nor does Section 10321(a) provide, that when the Commission relies exclusively on a particular statute as the source of its authority, it may take actions inconsistent with that statute.

authorities to invoke to achieve a desired result; that their actions are presumed valid; and that courts must defer to and accept an agency's reasonable interpretation of its own statutory authority if not contrary to the clearly expressed intention of Congress" (Conrail Petition at 23). The decision of the Court of Appeals, however, is fully consistent with each of these principles. As this Court stated in one of the cases cited by Conrail, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 n.9 (1984). The Court of Appeals performed that function here; it examined the language, history, and purpose of the particular statute on which the Commission relied and correctly determined that the specific actions taken by the Commission with respect to car hire and car service fell outside the scope of that statute.

III. THE DECISION OF THE COURT OF APPEALS LEAVES THE COMMISSION FREE TO TAKE ACTION UNDER OTHER STATUTES, OR TO DEREGULATE CAR HIRE ENTIRELY

The Solicitor General acknowledges that this Court should not review the car hire issue unless it also agrees to review the joint rate issue, because the decision of the Court of Appeals does not foreclose the Commission from promulgating the car hire regulations involved, or from achieving the professed objectives of these regulations, under certain provisions of the Interstate Commerce Act (Brief for United States, at 26 n.4.):

> "If the Court decides not to review the joint rate issue, we do not recommend considering the car hire issue independently. The decision below appears to leave room for adoption of this regulation on remand under other authority (Pet. App. 65a). Moreover, the car hire rules are under consideration in a wider context in Ex Parte No. 334 (Sub-No. 5),

> *Zone of Reasonableness for Car-Hire Charges*, 364 I.C.C. 299 (1980), and Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service—Advance Notice of Proposed Rulemaking*, 49 *Fed. Reg.* 27333 (July 3, 1984). While we are advised that neither of these proceedings is likely to render this case moot, they would offer the Commission alternative means for accomplishing its objectives in the event the petitions were denied." [16]

Under this reasoning, this Court should deny the request for review of the car hire issue *regardless* of its disposition of the joint rate issue. If the Commission remains free to adopt the regulations under other authority, the car hire issue certainly does not rise to the level of importance that warrants review by this Court.

The statement of the Solicitor General also demonstrates the lack of merit in the protests of the Commission that the decision of the Court of Appeals "forecloses" it from addressing the problems of car supply and freight utilization (*see* Commission Petition at 5-6). If the Commission wishes destination carriers to have greater leverage in their relationships with boxcar owners, the Commission appears to have the power to achieve this result under the "other authority" to which the Solicitor Gen-

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[16] The two proceedings to which the Solicitor General refers were instituted by the Commission even before the Court of Appeals issued its decision. In one proceeding, the Commission has given parties the opportunity to submit proposals as alternatives to the car hire and car service aspects of its *Boxcars I* decision. *See* Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service—Advance Notice of Proposed Rulemaking*, 49 *Fed. Reg.* 27333, 33026 (1984); Commission decision served September 28, 1984. In the second proceeding, the Commission is considering whether to grant carriers freedom to negotiate car hire increases above prescribed per diem rates. *See* App. 128a; Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car-Hire Charges*, 364 I.C.C. 299 (1980). As stated above, in 1980 the Commission authorized carriers to negotiate bilateral car hire reductions below prescribed per diem rates. Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroads Per Diem Levels*, 364 I.C.C. 291 (1980).

eral referred—Sections 11122 and 10505 of the Interstate Commerce Act.

First, Section 11122(a) of the Interstate Commerce Act empowers the Commission to promulgate regulations that include "the terms of any arrangement for the use by a rail carrier of a . . . freight car . . . not owned by the rail carrier . . ." (Conrail Petition at 4-5). Both the Court of Appeals and the Commission—which originally relied on this provision in *Boxcars I*—have construed the language of Section 11122 as appearing to empower the Commission to issue car hire regulations like those that the Commission attempted to promulgate here under Section 10505, provided that the conditions set forth in the statute are met (App. 65a-67a, 136a).

Second, as the Court of Appeals noted, the Commission can totally deregulate car hire pursuant to Section 10505, provided that the predicate findings under that statute can be made (App. 69a). Thus, under Section 10505 the Commission may exempt all terms of car hire arrangements—including per diem, storage fees, and empty mileage charges—from regulation and leave determination of these issues to the railroads through bilateral agreements (*id.*). In *Boxcars I*, the Commission stated that it "did not reject the notion of complete deregulation of car hire" (App. 165a). The pending Commission proceedings noted by the Solicitor General afford the Commission the opportunity to effectuate such complete deregulation.

The Commission, therefore, has not been foreclosed or circumscribed in its attempts to rectify problems in the areas of car hire and car service. The Court of Appeals simply held that the Commission could not promulgate regulations entitling carriers to impose the new storage fees and empty return charges under Section 10505.

Conrail argues that its petition should be granted because the decision of the Court of Appeals is an "erro-

neous and severe" limitation of the Commission's exemption authority (Conrail Petition at 21-22):

> "Absent total deregulation of prices and services, any exemption can be said to reflect a policy choice to permit new forces to offset the regulatory 'entitlements' of those benefitted by the remaining regulation, yet that fact has not impaired any of the ICC's major exemptions approved by the courts to date. The court cited no indication of Congressional intent that partial exemptions that achieve only limited deregulation are beyond the scope or intent of section 10505." (Footnotes omitted.)

This argument is totally misplaced, because it assumes that the decision of the Court of Appeals precludes the Commission from granting partial exemptions. In its decision, however, the Court of Appeals squarely held that the Commission *may* grant a partial exemption (App. 56a-57a). Authorizing carriers to assess storage charges and empty return charges to "offset" per diem charges is not an exemption from regulation, but new regulation. By contrast, in the previous exemptions granted by the Commission and cited by Conrail, the Commission exempted carriers from statutory requirements without attempting to substitute a new regulatory framework.[17]

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[17] *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), involved a decision of the Commission to exempt transportation provided by rail carriers in connection with trailer-on-flatcar and container-on-flatcar service from the provisions of the Interstate Commerce Act, with the exception of accounting and reporting requirements. *See* 49 C.F.R. § 1039.13. *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982), involved an ICC decision holding that states and their contract operators providing rail service on abandoned lines under state-organized rail programs would be exempt from: (1) the requirements of 49 U.S.C. §§ 10901 and 10903 that rail service be commenced or terminated only with prior Commission approval; (2) the common carrier obligations of 49 U.S.C. § 11101; (3) the labor protection provisions of 49 U.S.C. §§ 10903(b)(2) and 11347. *See also, e.g.*, 49 C.F.R. §§ 1039.11 and 1039.15 (exempting iron chloride liquid, iron sulphate, and export coal from all provisions of the Interstate Commerce Act except accounting and reporting requirements).

The decision of the Court of Appeals simply held that the Commission may not use Section 10505 as a source of authority for entitling carriers to assess storage fees and empty return charges. It leaves the Commission free to exercise its powers under Section 10505, as long as the action taken is an "exemption" from regulation. If that condition is a "limitation," it is a limitation imposed by Congress.

CONCLUSION

This case involves only an issue of statutory interpretation and presents no novel legal issues. The Court of Appeals properly applied the rules of statutory construction, and its conclusion that the actions of the Commission fell outside the scope of Section 10505 was clearly correct. The petitions for certiorari should therefore be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BRAE CORPORATION, *et al.*,
Respondents.

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE & WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether, in exempting railroad boxcar transportation from regulation, the Interstate Commerce Commission is free to ignore the language and the underlying Congressional purpose of recently enacted statutory joint rate and route provisions when finding that those provisions are not necessary to carry out the rail transportation policy.

2. Whether the Commission may lawfully use its exemption power to impose a new regulatory structure fixing, without regard to market conditions, the terms by which railroads compensate each other for the use of boxcars.

STATEMENT PURSUANT TO RULE 28.1

Because of its length, the list of affiliated companies, as required by Rule 28.1 of the Rules of this Court, is set forth as an Appendix, *infra*, pp. 1a-10a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-550

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BRAE CORPORATION, *et al.*,
Respondents.

No. 84-867

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE & WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In 1983, the Interstate Commerce Commission administratively exempted from most aspects of regulation the rail transportation of commodities in boxcars. It also adopted new rules restructuring the system by which one railroad compensates another for the use of the other's boxcar, the effect of which was to reduce the net "car hire" or "per diem" payments to which the owner is entitled.

The Court of Appeals affirmed the core of the Commission's order, upholding its sweeping exemption from maximum rate regulation. At the same time, the Court vacated the two other aspects of the Commission's order that are at issue here. First, the Court held that the agency had failed adequately to consider, in light of the Congressional policy embodied in the Staggers Rail Act of 1980, the impact of the exemption on joint rate and route relationships among railroads. Second, the Court held that the Commission's promulgation of a new car hire system for boxcars constituted affirmative regulation and therefore could not properly be justified solely as an exercise of the agency's exemption authority.

A. Regulatory Background

1. Most freight must move over the lines of more than one railroad to reach its destination. To maintain an integrated rail transportation system, the Interstate Commerce Act (the "Act") imposes on rail carriers the obligation to establish "through routes." 49 U.S.C. § 10703 (a) (1). The Commission has long interpreted that provision to require the free interchange of freight cars among connecting railroads. *See United States v. Pennsylvania Railroad*, 323 U.S. 612, 615, 619 (1945).

The through-route and mandatory-interchange requirements are the key to intramodal competition in the rail industry. As a result of railroad consolidations, several giant systems operating in different regions of the United States can now provide single-line service for most or all of a route. In most areas, regional and smaller railroads can serve a part but not all of a desired route. If through routes remain open at connecting gateways, regional railroads can offer shippers competitive joint-line routing and pricing alternatives to the larger carrier's single-line service.

Railroads that participate in through movements must have a mechanism for establishing joint-line freight rates.

The most common approach historically has been the "joint rate"—a single rate charged by two or more railroads together to carry a shipment over a through route. The participating carriers ordinarily agree on the "division" of revenues derived from a joint rate. As the Commission has recognized, "[j]oint rates simplify dealings with shippers and facilitate the ability of small railroads to compete with large ones." [1] As of 1980, it was estimated that "70 percent of the property transported by rail moves over through routes subject to joint rates." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 41 (1980).

As a practical matter, cancellation of a joint rate ordinarily diverts freight to the larger carrier's competing single-line route and leads to atrophy of the through route. "Combination rates"—under which each carrier sets and collects a separate rate applicable to its segment of a through movement—are a theoretical alternative to joint rates. The sum of such combination rates, however, "will almost certainly exceed the joint rate that they replace." *Chesapeake & Ohio Railway v. United States*, 704 F.2d 373, 376 (7th Cir. 1983). "Although the Commission would not acknowledge that the effect of cancelling a joint rate is to 'close' the through route, the whole point of cancellation is to divert traffic to an alternative route, and diversion implies 'closure'—whether total or partial is a detail." *Id.*

The Act directs the Commission, when the public interest requires, to prescribe joint rates and the division of revenues among participating carriers. 49 U.S.C. § 10705(a)(1). Until 1980, a carrier participating in a joint rate could not unilaterally cancel the rate or alter the divisions formula without the Commission's approval under a public interest standard. 49 U.S.C. § 10705(e).

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[1] Ex Parte No. 427, *Joint Rates Study: A Report to Congress Pursuant to Section 217 of the Staggers Rail Act of 1980*, slip op. at 2 (Nov. 12, 1982).

In the Staggers Rail Act of 1980, Congress relaxed the restrictions on unilateral joint rate actions while preserving essential protections for smaller railroads. 49 U.S.C. § 10705a. That approach represented a major legislative compromise and reflects a painstaking balance between sharply competing interests—on the one hand, the need to provide flexibility for the adjustment of uneconomic rate relationships; on the other hand, the need to permit smaller carriers to remain a vital competitive force in the rail industry.

2. Under the system of mandatory interchange, the Nation's freight cars, while individually owned, are considered a single common pool to be used by all railroads. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972). Of course, those who use freight cars owned by others must fairly compensate the owners. The Act authorizes the Commission to prescribe the applicable "car hire" or "per diem" rate for each type of freight car. 49 U.S.C. § 11122(a)(1). It specifies that the compensation rate must be determined by the cost of ownership, including a fair return on investment. 49 U.S.C. § 11122(b).

Throughout most of this century, per diem rates have been too low to produce a sufficient supply of freight cars, and the national rail system has been plagued by chronic boxcar shortages. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. at 744-46. Congress initially sought to stimulate supply by authorizing the Commission to include incentive elements in the per diem rate. 49 U.S.C. § 1(14)(a) (1976 ed.). The incentive per diem rates, however, created additional distortions, and, in the Staggers Act, Congress withdrew the agency's authority to include such elements, while reiterating that the basic per diem rate "should be sufficient to pay an adequate return on investment." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 117 (1980).

3. The exemption provision at issue here, originally enacted in 1976, was amended as part of the Staggers Act. It authorizes the Commission to grant an exemption from "the application of a provision" if it finds (1) that the provision "is not necessary to carry out the transportation policy of section 10101a" and (2) either that the transaction or service involved is of "limited scope" or that the statutory provision "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a).

The Commission may use its exemption power to remove regulation "consistent with the policies of Congress." H.R. Conf. Rep. No. 1430, *supra*, at 105 (1980). Those policies, which are enumerated in general terms in section 10101a, include "allowing rail carriers to earn adequate revenues," developing and preserving "a sound rail transportation system with effective competition among rail carriers," ensuring "effective competition and coordination between rail carriers," and preventing predatory practices and undue concentrations of market power. 49 U.S.C. § 10101a(3), (4), (5), (13). These broad statements of policy are particularized in the various substantive provisions enacted concurrently with section 10101a.

B. Proceedings Before the Commission

Petitioner Consolidated Rail Corporation ("Conrail") began this case in May 1981 when it filed a petition asking the ICC to exempt from regulation the transportation of all commodities moving in boxcars to, from, or on Conrail's lines. Following public notice, and in the face of overwhelming opposition from every segment of the transportation community, Conrail modified the car hire aspects of its proposal. Instead of a complete exemption from interchange and per diem obligations, Conrail sought new rights (1) to charge boxcar owners up to 35 cents per mile whenever empty boxcars are returned to them at their request, and (2) to store others' empty cars and

offset or "reclaim" all car hire beginning three days after a car is unloaded. Conrail also asked the Commission to confirm that carriers could enter into bilateral agreements concerning per diem rates, empty movements, and storage.

After further public comment, most of which opposed the new scheme, the Commission decided over the dissent of Chairman Taylor, to "exempt[] boxcar service from regulation to the extent described in Conrail's modified proposal" and to apply the exemption to "all railroads." Pet. App. 106a. The Commission majority accepted Conrail's "fundamental premise" that "truck competition for the transportation of boxcar commodities is pervasive and limits the railroads' pricing freedom." *Id.* at 113a.

Notwithstanding the concerns of smaller railroads that they would be vulnerable to harmful joint rate surcharges and cancellations, and the concerns of shippers that such rate and route cancellations would deprive them of access to competitive routing alternatives, the Commission altogether exempted joint rate and through route relationships from its regulatory oversight. *Id.* at 123a-124a. It did not discuss or refer to the extensive legislative history behind the Staggers Act's joint rate protections for smaller railroads.

The Commission acknowledged that the new car hire rules would have "some effect on the levels of net compensation received by carowners" and that "[s]hort-line railroads . . . may have good cause to be concerned about the near term effects of the proposal." *Id.* at 131a, 132a. The Commission described the adverse financial impact on smaller railroads and car suppliers as "unfortunate," but it did "not see this as contrary to any of the pertinent considerations under section 10505." *Id.* at 134a.

While the Commission characterized its new car hire system as "a partial exemption from regulation subject to conditions," it acknowledged that its action "could be con-

strued in some respects as being new regulation." *Id.* at 136a. It therefore stated: "To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122," the statutory section governing the Commission's car compensation rules. *Id.*

Although the Commission received more than 70 petitions for reconsideration and stay, it nonetheless reaffirmed its order in all respects save one. It withdrew "any reliance on section 11122 as authority for [its] approval of [Conrail's modified] proposal," thereby resting the new regulations exclusively on its section 10505 exemption power. *Id.* at 167a. By its own admission, the Commission took that action to sidestep the "substantial legal questions" raised by its failure to refer to section 11122 in its notices of proposed rulemaking. *Id.*[2]

C. Court of Appeals Decision

The Court of Appeals reviewed the Commission's decision under the standards set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983). Pet. App. 24a-26a. It "focuse[d] on the reasoned nature of the Commission's decision, taking into account the nature of that decision and of the components that can be reasonably expected to go into it." *Id.* at 26a. The Court of Appeals relaxed the usual requirements, however, in view of the Staggers Act's broadening of the Commission's exemption power. "Given that explicit congressional mandate, we do not believe the Commission need as exhaustively review and explain away its original justifications for aban-

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[2] The Commission put its decision into effect on January 1, 1984, but postponed—initially until July 1, 1984, and subsequently until July 1, 1985—implementation of the new car hire provisions as applied to "Class III" railroads—those with less than $10 million in annual revenues.

doned regulations as if it were operating under the same statute it always had." *Id.* at 25a.

1. The Court concluded that "the Commission's general exemption of boxcar freight rates from regulation was amply reasoned and supported by the record." *Id.* at 91a-92a. Employing "the same broad lens for review," however, the Court concluded that the Commission's decision with respect to joint rates and routes was "not supported by adequate consideration of relevant factors." *Id.* at 50a. The Court determined that the Staggers Act's legislative history concerning the relationship between the exemption provision (§ 10505), the rail transportation policy (§ 10101a), and the newly enacted joint rate and route provisions (§ 10705a) "clearly demonstrates that Congress anticipated that the ICC would engage in a far broader and more thorough inquiry into the need for continued joint rate regulation before granting a total and unconditioned exemption of joint rates from any oversight or regulation." *Id.* at 42a.

The Court identified two pivotal gaps in the Commission's reasoning. First, long-haul carriers often participate with smaller carriers in joint-line routes that compete directly with the long-haul carrier's single-line route between the same points. Congress had recognized the danger of anticompetitive rate or route cancellations in such circumstances and had included protections against such actions in section 10705a. *See* Pet. App. 43a. Without any consideration of the Congressional policy, however, the Commission "simply dismissed . . . as unlikely" the possibility that large carriers would cancel efficient joint-line routes with smaller carriers. *Id.* That assumption seemed inconsistent with other statements in the Commission's decision, *id.* at 42a-43a, and it was directly contradicted by the Commission's own analysis in a related proceeding. The Court accordingly concluded that the Commission "fail[ed] to adequately explain its crucial assertion that large long-haul carriers will not

close off efficient routes of small short-haul carriers." *Id.* at 42a.

Second, many shortline originating or terminating carriers connect only with a single trunkline railroad and are therefore wholly dependent on the larger carrier for their ability to move traffic beyond their own lines. Congress had recognized in the Staggers Act the inherent danger that a trunkline carrier, by manipulating the division of joint rates or otherwise, might appropriate to itself all the profits from a through movement with a shortline railroad. It included specific protections against that result in section 10705a, as a manifestation of its policies in section 10101a favoring adequate revenues for carriers and prohibiting predatory practices. The Court concluded that the Commission's "total failure to address this highlighted issue renders inadequate its finding that small carriers will be protected in the absence of regulation." Pet. App. 47a. "The Commission's response that large carriers have no incentive in the short run to drive more efficient small carriers out of business simply fails to address Congress' concerns that rail carriers receive enough revenue to pay for efficiency increasing improvements and to encourage further investment to keep the rail system healthy." *Id.* at 46a.

In remanding the joint rates portion of the Commission's order, the Court made clear that the Commission would have ample latitude to proceed as it deems appropriate. The basis of the remand "was the failure of the Commission to explain adequately the likely effect of deregulation of joint rates on rate divisions." *Id.* at 100a. The Commission is therefore free either to "reevaluate[] its exemption of joint rates in light of our holding today" or to issue new rules that are consistent with that holding. *Id.* at 92a. "Our task is solely to insure that it provides adequate justification for whatever it does." *Id.* at 101a.

2. The Court of Appeals also vacated the car hire portion of the Commission's order, on the ground that it was "a promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a)." *Id.* at 93a. The Court's holding rests on two conclusions.

First, "the Commission's power under section 10505(a) is limited to the power to deregulate; to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry." *Id.* at 59a. Second, "the Commission here was *not* deregulating, but rather was imposing a new regulatory framework over the car hire relationship." *Id.* at 60a (emphasis in original). The new rules, "rather than leaving the contours of the car hire relationship to the market" (*id.* at 61a), "dictated a substantial component of the initial economic relationship that will exist as the parties enter negotiations, regardless of the alignment of any other market factors." *Id.* at 62a. Injecting "measures into the marketplace to induce a particular desired response"—"[d]eciding which party should bear the cost of moving empty boxcars, regardless of market factors"—"can hardly be characterized as deregulation." *Id.* at 64a.

The Court emphasized that the Commission could consider adopting the same rules under the standards of 49 U.S.C. § 11122, which empowers the agency to promulgate car hire regulations. *Id.* at 65a. Alternatively, it could "exempt compliance with section 11122," if the result were truly deregulation rather than new regulation. *Id.* at 69a. Finally, the Commission could properly adopt a partial exemption; it "need not deregulate at one fell swoop." *Id.* at 57a. "What it cannot do," according to the Court, "is end run rule-making procedures by labeling a new reguiatory structure as an exemption." *Id.* at 69a.

ARGUMENT

The decision of the Court of Appeals is correct; it conflicts with no decision of this Court or any other Court of Appeals; and it will not interfere with the Commission's execution of its statutory responsibilities. Further review is therefore unwarranted.

I. The Commission Failed Adequately to Consider the Congressional Policies on Joint Rate and Route Regulation

A. The Court of Appeals' decision is founded on two holdings: (1) that the Congressional policies on joint rates and routes, fashioned contemporaneously with enactment of the broadened exemption power and the rail transportation policy, were a relevant factor to be considered by the agency; and (2) that the Commission failed adequately to consider those policies. A brief review of the Staggers Act's joint rates compromise is necessary to place those holdings in proper perspective.

Before 1980, it had been difficult for a railroad to adjust or escape from a joint rate relationship even if it was unprofitable. The carrier could not unilaterally cancel a joint rate, change the rate level, or alter the division of revenues without the approval, under 49 U.S.C. § 10705(e), of a traditionally unsympathetic ICC. Furthermore, during the pre-Staggers Act period, the Commission made "consistent use of its discretionary powers" to order " 'the routine suspension of proposed joint rate cancellations . . . until a final decision could be reached on the merits.' " *Southern Railway Co. v. ICC*, 681 F.2d 29, 34 (D.C. Cir. 1982).

The Carter Administration attempted to respond to this problem in drafting the Railroad Transportation Act of 1979 (the forerunner of the Staggers Act). It "proposed to continue the [ICC's] through-route authority but to eliminate the Commission's authority with regard to joint rates." S. Rep. No. 470, 96th Cong., 1st Sess. 12

(1979). Administration spokesmen argued (just as petitioners here argue) that continued joint rate regulation was not needed to protect smaller carriers, because the long-haul carriers "will not act so imprudently as to drive profitable traffic away." [3] In the Administration's view, "discrimination against short-line" carriers would not "be a serious, or pervasive, problem," because the trunkline carriers "have an economic interest in working" with their smaller connections.[4]

The House and Senate hearings on the bill generated "considerable testimony and total opposition to the administration's proposal" to deregulate joint rates.[5] The testimony focused on two problems. First, feeder lines—originating or terminating carriers that connect only with a single trunkline carrier—were concerned that their larger connecting railroads would be free, under the Administration's proposal, to extract all the profits out of joint movements, a result that would harm both the feeder lines and the shippers dependent upon them.[6]

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[3] Railroad Deregulation Act of 1979: Hearings Before Subcomm. on Surface Transportation of Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 1st Sess. 254 (1979) (statement of Robert E. Gallamore, Deputy Administrator, Federal Railroad Administration, Department of Transportation).

[4] *Id.* at 276. *See also* Rail Act of 1980: Hearings Before Subcomm. on Transportation and Commerce of House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 315 (1980) (statement of Darius Gaskins, Chairman, Interstate Commerce Commission) ["*1980 House Hearings*"].

[5] 125 Cong. Rec. S 29,958 (October 29, 1979) (statement of Sen. Cannon); *accord* S. Rep. No. 470, 96th Cong., 1st Sess. 12 (1979).

[6] For example, the President of the American Short Line Railroad Association explained:

> Whereas a major railroad will usually have a number of available routes and gateways, that is not generally the case with a short line. It has one partner and one partner only; if that partner imposes a surcharge on its traffic, there is no way it can be avoided . . . . A commodity that is the life blood of a

Second, smaller regional railroads feared that their larger joint-line partners would be free, in the absence of regulatory oversight, to cancel or manipulate the joint rate to divert traffic to the larger carrier's competing single-line route.[7] In response to these concerns, Representative Florio, chairman of the presiding subcommittee and a key architect of the Staggers Act, explained that protection for smaller railroads was of paramount importance: "The Committee is very concerned that small carriers not be put in a position where they are at the mercy of large connecting carriers. Whatever the resolution of the joint rate problem, smaller carriers must be protected. . . . [A] delicate balance . . . must be struck." [8]

After extensive debate, which at times jeopardized passage of the entire bill, Congress struck that "delicate balance." The compromise, enacted as 49 U.S.C. § 10705a, had two elements. On the one hand, the provision relieved railroads from non-compensatory or marginally compensatory joint rate arrangements. It allowed a carrier, unilaterally and without ICC approval, to cancel or impose a surcharge on a joint rate if its revenues from the movement were less than 110 percent of its variable costs.

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short line may be totally insignificant to a major road that has a large mix of traffic and an equally large number of shippers.

1980 House Hearings at 510 (statement of Howard Croft).

[7] For example, the President of the Association of American Railroads testified that one of the "major difficulties" of the Administration's proposal, and "a matter of great concern to many railroads," was that "a carrier might cancel the joint rate and establish its own local rate for its part of the through movement at a level that would drive traffic to that carrier's own single-line routes between the points in question. This is a form of abuse of monopoly power." Railroad Deregulation Act of 1979: Hearings Before Subcomm. on Transportation and Commerce of House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 124 (statement of William H. Dempsey) [*"1979 House Hearings"*].

[8] *1979 House Hearings* at 325.

On the other hand, the provision gave smaller railroads special protections designed to deal with both of the major problems identified during hearings on the bill. To protect shortline feeder carriers, the statute authorized the ICC to reduce a carrier-imposed surcharge or to prescribe a different joint rate division if a Class III originating or terminating railroad could show that its return would otherwise be inadequate or that a shipper on its line would suffer a significant market loss. § 10705a(j). To protect against anticompetitive joint rate actions by long-haul carriers favoring their competing single-line routes, the statute directed the ICC to rescind any cancellation or surcharge within 30 days if a Class III railroad could show that the cancellation or surcharge would adversely affect competition. § 10705a(i). The compromise also required the Commission, on petition by a small railroad, to prescribe a new compensatory rate to replace a cancelled joint rate. § 10705a(*l*).

The architect of the compromise was Representative Lee, and the provision is known as the "Lee Amendment." When the amendment was introduced on the floor, Representative Lee explained its purposes at some length. The provisions were intended, he stated, to "preserv[e] short line railroads as effective competitors," "to promote development of class II and class III carriers," and "to insur[e] that the new regulatory freedoms will not be used to stifle the development of our smaller class II and class III carriers which are an important element, and a growing element, in the national rail network." [9] Those who hammered out the compromise were particularly mindful of the ICC's broadened exemption power. Although there was no need to prohibit all joint rate exemptions, Representative Lee unequivocally expressed the intent of the framers that the Commission should not use its exemption authority in a way that would undercut the policy reflected in the joint rates compromise. He stated:

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[9] 126 Cong. Rec. H 24,828 (September 9, 1980).

> In this bill we broaden the exemption clause creating a simpler standard. In no case should the exemption clause be allowed in a circumstance that would allow a large carrier to utilize its market power to squeeze a smaller carrier on a joint rate or division or to force a de facto cancellation. *In other words the exemption clause should never be used to "end run" the joint rate provisions contained in section [10705a].*[10]

The policies of the Lee Amendment find expression in several elements of the rail transportation policy of section 10101a: promoting an efficient rail transportation system with adequate revenues for carriers, ensuring effective intramodal competition and coordination, and preventing predatory practices and undue concentration of market power. 49 U.S.C. § 10101a(1), (3), (4), (5), (10), (13). When the Commission considers, under its exemption authority, whether the joint rate and route provisions of the statute are needed to carry out the rail transportation policy, can there be any doubt that one relevant factor in that determination is the underlying legislative purpose of those provisions? Where Congress has so recently visited and so extensively debated the subject, and where the resulting legislation embodies such a carefully constructed compromise, it is inconceivable that the agency would be entitled to ignore the policy of that compromise when it considers granting an exemption from it.

We do not argue, and the Court of Appeals did not hold, that the Commission can never exempt carriers from the joint rate and route provisions. Our point, with which the Court of Appeals agreed, is only that the Commission must consider, when the issue is properly raised, whether such an exemption would conflict with the language and intention of the Lee Amendment—whether, in other words, the effect would be to end-run the legislative compromise.

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[10] *Id.* (emphasis added).

Nothing in the comments of Representatives Madigan and Staggers, cited by petitioners (Conrail Pet. 7; U.S. Br. 20), contradicts Representative Lee's statement that the exemption power should not be used to vitiate the policies embodied in the joint rates compromise. On the contrary, Representative Madigan strongly endorsed the objectives of the Lee Amendment. He stated: "One of the major purposes of this bill is to encourage the development of short line and feeder line railroads. Therefore we were particularly careful not to do anything which would cause economic hardship to existing short line railroads." [11]

B. Petitioners' response comes in four waves.

First, they belittle Representative Lee's remarks. Conrail Pet. 18-19 & n.30; U.S. Br. 20. But the Commission itself has recognized elsewhere that the Lee Amendment embodies a strong Congressional policy that is entitled to "significant weight" in the agency's consideration of joint rate issues, even under other sections of the statute. *Restructured Rates on Recyclables—Conrail*, 365 I.C.C. 596, 614 (1982). Both the Commission and the courts have correctly treated Representative Lee's comments, not as a token of one legislator's "hope" (U.S. Br. 20) that the agency would honor the joint rates accommodation, but as an authoritative expression of the Congressional purpose. *E.g.*, Ex Parte No. 427, *Joint Rates Study*, *supra*, at 10-15; *Minneapolis, Northfield & Southern Railway v. ICC*, 707 F.2d 984, 988 (8th Cir. 1983).

Second, petitioners argue that the Lee Amendment and its underlying legislative policy are irrelevant. The Commission, they say, need look only as far as the bare words of section 10101a; it has no obligation to consider why Congress thought the Lee Amendment was necessary to carry out the policies expressed by those words. Conrail

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[11] 126 Cong. Rec. H 17,789 (June 30, 1980).

Pet. 18-20; U.S. Br. 18-20. But the Congress that adopted the Lee Amendment is the same Congress that enacted the exemption clause. Indeed, both provisions are part of the same enactment. The only relevant legislative history suggests strongly that the Commission must at least look at the policies of the Lee Amendment before abrogating its protections. That conclusion requires no departure from the statutory language. As the Court of Appeals correctly reasoned, the section 10101a policies are not isolated abstractions; they are anchored in and illuminated by the policies of the Lee Amendment. Pet. App. 42a, 45a-49a.

Under petitioners' sterile approach, the Commission would be free to ignore the purposes of a provision from which it was granting an exemption. It could lawfully remove from the books a recently enacted provision without even bothering to ask why Congress put it there in the first place. Congress could not have intended to clothe the agency with the power to negate legislative policy without even considering what that policy is.

Third, petitioners recast the Court's decision and attack a straw man of their own making. They assert that the Court injected into the rail transportation policy a new element—"fair divisions"—that is not set forth in section 10101a. Conrail Pet. 13-14, 17-20; U.S. Br. 18-21. But only the most inhospitable reading of the Court's opinion could support such an assertion. The Court's analysis focused precisely on the policies set forth in section 10101a. Its discussion of joint rate divisions, like its discussion of anticompetitive route closings, was intended, not to add new elements to the transportation policy, but to give relevant content to the elements already there. It held, not that the Commission must guarantee fair divisions (*see* U.S. Br. 13), but only that the agency must "explain adequately the likely effect of deregulation of joint rates on rate divisions" (Pet. App. 100a)—in other words, that it must reckon with the

unequivocal Congressional policy favoring protection of smaller railroads against rate squeezes by their larger connecting carriers.

Fourth, without suggesting that the Commission considered or even mentioned the Lee Amendment's purposes, petitioners seek to excuse that deficiency by arguing that the agency nevertheless adequately addressed the exemption's impact on smaller railroads. ICC Pet. 7-14; Conrail Pet. 15-17, 20; U.S. Br. 16 n.9, 21-23. To the extent it addressed the cancellation and divisions issues at all, however, the Commission reached conclusions directly contrary to those of Congress. Since the Commission paid no attention to the legislative history, that result is hardly surprising. This is an instance, therefore, not of a court second-guessing an agency's economics, but of an agency, perhaps inadvertently, second-guessing the judgment of Congress.

According to petitioners, for example, the Commission found that "large long-haul carriers will not close efficient routes in which they participate in connection with small short-haul carriers," because such "cancellations [would be] . . . directly contrary to their self-interest." ICC Pet. 8. The Commission's assertion to that effect, as the Court of Appeals noted, was "crucial" to its conclusion that regulation was not needed to protect against such cancellations. Pet. App. 42a. But it was also the same economic theory that the Carter Administration advanced and that Congress rejected in enacting the Staggers Act. See pp. 11-12, *supra*. The Commission made no effort to reconcile its judgment with the conflicting Congressional determination, nor did it even seem aware of the divergence.

Moreover, in an earlier decision in which it had treated the cancellation issue far more thoroughly, the Commission had reached the opposite conclusion. It found there that, because of the peculiarities of railroad economics, a long-haul carrier *will* have a financial incentive in

many situations to prefer its own less efficient single-line route over a more efficient joint-line route. *Traffic Protective Conditions*, 366 I.C.C. 112, 125-26 (1982), *rev'd on other grounds*, 725 F.2d 47 (6th Cir. 1984.) In contrast to its exemption decision in this case, the Commission there emphasized that its removal of certain regulatory safeguards would "not leave an interchange partner completely unprotected." *Id.* at 126. "Where carriers route traffic over a more circuitous single-line route in order to preserve their long haul, statutory protections (*i.e.*, sections 10705 and 10705a] are available to protect efficient joint-line routes." *Id.* By its action here, the Commission nullified those very protections as to boxcar traffic, with no apparent awareness that it had made contradictory findings in its *Traffic Protective Conditions* decision.[12]

These are serious holes in the Commission's reasoning. They cannot be plugged with facile *post hoc* rationalizations. Counsel for the United States may believe that the Congressional judgment in the Staggers Act can be ignored because it did not deal with "*competitive* transportation services" (U.S. Br. 20; emphasis in original), or that the *Traffic Protective Conditions* analysis can be explained away on the ground that any "efficiency loss" from the cancellation of a more efficient joint-line route "would be outweighed by the benefits of the exemption in the ordinary case." U.S. Br. at 23 n.11. But these

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[12] This aspect of the Commission's analysis in *Traffic Protective Conditions* is supported by recent economic and legal analysis. In Carlton & Klamer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. Chi. L. Rev. 446, 451-53 (1983), the authors explain that, in the railroad industry, "prices must exceed marginal costs if firms are to break even, because firms must build and maintain costly networks." *Id.* at 451. "Wherever price exceeds the marginal cost of using a link in the network, each firm will have an incentive to try to obtain traffic . . . over its link to gain revenue, regardless of whether the result is inefficient overall routing." *Id.* at 452.

are not the Commission's reasons; the Commission has not spoken. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. at 2870.

The Commission's consideration of the divisions issue was equally deficient. It asserted that "neither carrier will insist on a division of profits so disproportionate as to force the other to withdraw from the movement to avoid a loss and thus to forfeit the traffic for both carriers." Pet. App. 124a. But Congress reached a different judgment. It concluded that shortline carriers and their shipper customers might be injured as a result of joint-rate actions by long-haul connecting carriers, and it provided an appropriate remedy. 49 U.S.C. § 10705a(j). The Commission made no effort to square its conclusion with that of Congress. Nor did the agency deny that a larger railroad would be free under the exemption to extract every ounce of profit from joint rate traffic save what is barely needed to keep the feeder railroad in the movement. But that is precisely the sort of rate "squeeze" to which Congress did not wish the shortline railroads to be subjected.[13]

C. The decision below does not conflict, even in "approach" (U.S. Br. 24), with the Fifth Circuit's decision

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[13] Petitioners argue that "[i]t is logically inconsistent for the court to find . . . that railroads do not have monopoly power vis-a-vis shippers and at the same time conclude . . . that individual carriers may be able to extract economic 'rents' from a movement by exploiting their connections." ICC Pet. 13; *see also* Conrail Pet. 17-18 n.26; U.S. Br. 23. As the Court of Appeals correctly explained, however, upholding the Commission's finding that railroads do not have "undue monopoly power" does not imply that "rail transportation operates in a perfectly competitive market where all railroads' costs (including reasonable returns on capital) equal their revenues." Pet. App. 44a-45a n.1. "In other words, the finding of no monopoly power vis-a-vis shippers does not, as the Commission itself reasoned, mean that railroads generally are not in a position to reap and divide among themselves the rewards of their operating efficiencies where such efficiencies exist." *Id.*

in the "piggyback" case, *American Trucking Associations v. ICC*, 656 F.2d 1115 (5th Cir. 1981). The Court there affirmed in substantial part an ICC exemption for rail transportation in trailer-on-flatcar and container-on-flatcar ("TOFC/COFC") service. No question was raised concerning the Congressional policy on joint rates and routes, and the Court of Appeals had no occasion to consider it.

More important, as the Fifth Circuit noted, Congress in section 10505(f) "specifically authorized the Commission to exempt TOFC/COFC rail service." *Id.* at 1126. "While section 10505(f) does not absolve the Commission from the need to make the section 10505(a) findings, it does indicate plainly that Congress felt that TOFC/COFC service was an appropriate subject for the exercise of the Commission's section 10505(a) exemption authority." *Id.* Congress made no similar determination with respect to boxcar service.

D. Petitioners assert that the Court of Appeals' decision will impair the Commission's implementation of its exemption authority. ICC Pet. 5-6; Conrail Pet. 13-14; U.S. Br. 25-26. But those claims rest on petitioners' mistaken view that the Court has "engraft[ed] an additional substantive requirement on the Commission's exemption authority." U.S. Br. 13. Only petitioners' bloated interpretation of the Court's decision, not the decision itself, fits that description. The Court did only what it said it was doing—it insisted on "adequate consideration of relevant factors," leaving the Commission free on remand to take any action it wishes so long as "it provides adequate justification for whatever it does." Pet. App. 50a, 101a. Requiring the Commission to consider adequately Congressional policies that lie at the heart of a proposed exemption is a means of enforcing, not obstructing, the Congressional will.

II. The Car Hire Rules Are New Regulation, Not An Exemption From Regulation

The Court of Appeals held (1) that 49 U.S.C. § 10505 empowers the Commission to deregulate, not reregulate, and (2) that the new car hire rules were in fact reregulation, not deregulation. Pet. App. 56a-65a.

Only Conrail disputes the first holding, which it portrays as precluding "partial exemptions that achieve only limited deregulation." Conrail Pet. 22. But the Court of Appeals specifically confirmed that the Commission may grant "either partial or complete exemptions" and "need not deregulate at one fell swoop." Pet. App. 56a-57a. The Court held only that any such partial exemption must lead to "*decreased* regulation," not to increased or reformulated regulation. *Id.* at 57a (emphasis in original).

Petitioners' major disagreement is with the Court's application of that standard to the Commission's new car hire scheme. But whether a system of empty return charges and storage reclaim fees constitutes a rule or an exemption, whether it deregulates or reregulates, does not require the attention of this Court. The issue is bound up tightly with the complexities of freight car compensation, and no similar issue is likely to arise in the future. Moreover, the Court's resolution of the question is of minimal practical consequence. The Commission has been left free on remand to consider adopting the same rules under the substantive authority of 49 U.S.C. § 11122 and to consider other options, including an exemption from the requirements of that section. Pet. App. 65a, 69a. In fact, the agency instituted a proceeding in June 1984, even before the Court of Appeals' decision, precisely to consider such proposals,[14] and the outcome of that consideration may well moot the issues

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[14] Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service*, 49 Fed. Reg. 27,333 (July 3, 1984).

in this case. As the United States has accordingly acknowledged, the car hire issues do not independently warrant review by this Court. U.S. Br. 26 n.14.

In any event, the Court of Appeals reached the correct result. Even the Commission has taken both sides of the issue—first acknowledging that the modified car hire regime could be characterized as "new regulation," then retreating to its current position solely for procedural reasons. Pet. App. 134a, 167a. It was right the first time.

The question must be viewed in the context of 49 U.S.C. § 11122, which authorizes the Commission to regulate freight car compensation and provides that "[t]he rate of compensation . . . *shall* be determined by the expense of owning and maintaining [each] type of freight car, including a fair return on its cost" (emphasis added). The Commission had earlier prescribed car hire rates for boxcars in accordance with that standard.[15] It conceded here that its new car hire rules would effectively reduce the net rate of compensation to which boxcar owners would be entitled. Pet. App. 131a. It made no finding, however, that the new compensation rate would satisfy the fair return standard of section 11122. In effect, the Commission put in place a new system of car compensation without regard to the Congressionally imposed requirements for approving such a system.

The argument that its exemption power permits the Commission to disregard those requirements gives life to the Court of Appeals' statement that the Commission seeks "carte blanche to rewrite the Interstate Commerce Act under the umbrella of its exemption powers." Pet. App. 59a. If petitioners' reading of the exemption clause were right, "the Commission could invoke section 10505(a)

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[15] *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 715 (1977), *revised at* 361 I.C.C. 189 (1979) and 362 I.C.C. 884 (1980).

as the authority both for exempting a section and then for re-regulating the industry under a completely different format," without making any of the findings required by section 11122 for new regulation. *Id.* at 59a-60a. To confer such power on the agency would be particularly dangerous in light of petitioners' assertions that the Commission need not even provide notice and an opportunity for public comment before adopting an exemption. ICC Pet. 4; U.S. Br. 4.

The United States would allow the Commission to take virtually any action under its exemption power—including the imposition of new regulatory burdens and the reassignment of regulatory benefits—so long as the "direction" of the change is "an increase in the degree to which market forces determine the deployment of resources." U.S. Br. 28. But the United States cites no evidence in the statute or the legislative history to suggest that Congress intended the exemption power to be used to impose fresh regulatory burdens. As the Court of Appeals correctly concluded, the legislative history points sharply in the other direction. Pet. App. 57a-59a.

In any event, applying the "market forces" standard suggested by the United States would not change the result here. As the Court of Appeals properly found, "[i]nstead of allowing the market to determine the relationship between 'suppliers' and 'purchasers', the Commission embraced a system under which certain vital segments of that relationship were fixed and predetermined, *regardless of market forces.*" Pet. App. 64a-65a (emphasis in original). "[R]ather than leaving the contours of the car hire relationship to the market," as the United States contends the agency did, "the Commission skewed the initial economic relationship in favor of the destination carrier." *Id.* at 61a.

There is no merit to the claim that the Court has "foreclos[ed] the Commission from using the exemption power to permit market forces rather than regulation to allo-

cate boxcar resources." ICC Pet. 17. The Court specifically stated that the exemption power *could* properly be used "to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry." Pet. App. 59a.

The Commission's car hire rules cannot be saved by arguing that they are intended merely "to create an incentive to reach [bilateral] agreements." U.S. Br. 8; *see also* Conrail Pet. 10. As the Court of Appeals correctly concluded, the promulgation of a new regulatory system "does not metamorphize into a deregulatory exemption simply because it may encourage some carriers to enter bilateral agreements that will dictate the terms for the use, storage, and return of boxcars." Pet. App. 62a. Nor would otherwise unlawful car hire rules become a lawful exemption merely because they might be "circumvented" by some carriers through adjustments in their freight rates. ICC Pet. 16; *see also* Conrail Pet. 21-22 n.33.

Finally, this Court's decisions upholding the Commission's power to attach conditions to its approval of tariffs are of no help to petitioners here. It is one thing to permit an agency, in the face of a regulatory gap, to "elaborate upon its express statutory remedies when necessary to achieve specific statutory goals." *ICC v. American Trucking Associations*, 104 S. Ct. 2458, 2465 (1984). It would be quite another thing to uphold, as an adjunct of the Commission's exemption power, the use of a "condition" that imposes new regulations without regard to the applicable express statutory standards. As the Court of Appeals correctly held, the Commission may not, merely by calling its action a conditioned exemption, use "its deregulatory powers as a means to achieve a new regulatory format." Pet. App. 67a-68a.

III. Review of This Case Is Not Warranted Regardless of the Court's Disposition of the Export Coal Case

The Court has before it petitions for review of a decision by another panel of the District of Columbia Circuit involving the ICC's "export coal" exemption. *Coal*

Exporters Association v. United States, 745 F.2d 76 (D.C. Cir. 1984), *petitions for cert. pending*, Nos. 84-884, 84-885. The United States sees similarities in the cases. U.S. Br. 12-13. Any resemblance, however, is superficial; the cases are both factually and analytically distinct. Regardless of the Court's disposition of the export coal petitions, review of the present case is not warranted.

First, the cases involve different arms of the exemption clause. The focus of the export coal case is on the "abuse of market power" standard, and the issue is whether the exemption would allow railroads to charge shippers unreasonably high rates. In this case, by contrast, the focus is on the "rail transportation policy" standard. The "abuse of market power" and rate reasonableness issues in this case were resolved by the Court of Appeals in the Commission's favor. No party has sought review of that portion of the Court's judgment, and those issues are therefore not before this Court.

Second, the Court of Appeals in the export coal case held that the Commission's balancing of the competing Congressional policies had resulted in "a wholly unreasonable construction of the Staggers Act's accommodation between shipper and carrier interests." 745 F.2d at 95. Here, by contrast, the Court of Appeals held that the Commission failed even to consider whether there *were* competing Congressional policies. The error in export coal, according to the Court, was the agency's interpretation of the Congressional intent. The error here was the Commission's inattention to the Congressional intent. As the Court of Appeals stated, this was a breakdown in "reasoned decisionmaking," Pet. App. 43a, the Commission having "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. at 2867. That decisional breach will remain regardless of how this Court disposes of the export coal case.

Third, there is no dispute that the issues presented by the car hire rules adopted by the Commission and vacated

by the Court of Appeals are unique to this case and have not been involved in any other exemption decision of the Commission, including its export coal decision.

Therefore, certiorari should not be granted to review the decision below, regardless of the Court's disposition of the petitions for review in the export coal case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Pursuant to Rule 28.1 of the Rules of this Court, the following list identifies all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of each corporate party on whose behalf this brief is filed.

BRAE Corporation *
- Air Momentum, Inc.
- American Sign & Indicator Corp.
  - Canadian Sign & Indicator Corp.
  - American Sign & Indicator Finance Corp.
  - Computer Graphics, Inc.
- Cargo, Inc.
- Intermodal Brokerage Services, Inc.
- Interstate Transport Systems, Inc.
- J. C. Holding Corp.
- National Piggyback Services, Inc.
- Rail Finance Corp.

Amoskeag Co.
- Amoskeag Management Corp.
- Bangor and Aroostook Railroad Company
  - Bangor Investment Company
  - Van Buren Bridge Company
- Fieldcrest Mills, Inc.
- Moore's Falls Corp.
- Westville Homes Corp.

Guilford Transportation Industries, Inc.
- Boston and Maine Corporation
  - Springfield Terminal Co.
  - BMX, Inc.
  - Northern Railroad Company
  - Vermont & Massachusetts Railroad Company

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* In addition to the companies listed, BRAE Corporation has several other subsidiaries, each of which has the name BRAE in its corporate name.

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The Napierville Junction Railway Company
Saratoga & Schenectady Railroad Company
Albany & Vermont Railroad Company
Maine Central Railroad Company
Portland Terminal Co.

Bessemer and Lake Erie Railroad Company
United States Steel Corporation
Elgin, Joliet and Eastern Railway Company
Duluth, Missabe and
Iron Range Railway Company
Union Railroad Company
McKeesport Connecting Railroad Company
The Newburgh and
South Shore Railway Company
The Lake Terminal Railroad Company
The Pittsburgh & Conneaut Dock Company
Birmingham Southern Railroad Company

Elgin, Joliet and Eastern Railway Company
United States Steel Corporation
Bessemer and Lake Erie Railroad Company
Duluth, Missabe and
Iron Range Railway Company
Union Railroad Company
McKeesport Connecting Railroad Company
The Newburgh and
South Shore Railway Company
The Lake Terminal Railroad Company
The Pittsburgh & Conneaut Dock Company
Birmingham Southern Railroad Company

The Pittsburgh and Lake Erie Railroad Company
Beloit Corporation
Montour Railroad Company
Youngstown and Southern Railway Company
Lake Erie and Eastern Railroad Company
The Mahoning State Line Railroad Company

The Monogahela Railway Company
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Younghiogheny Railway Company
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Kennedy Bay Timber Sandinian Berhad (Malaysia)
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Westwood Insurance Agency
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Weyerhaeuser Mortgage Co. of Nevada
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Weyerhaeuser Venture Co.
The Quadrant Corp.
Quill Corp.
Scarborough Corp.
Scarborough Constructors, Inc.
Trendmaker Homes, Inc.
Westmark Development Co.
Westminister Co.
Westwood Securities Co.
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Quadrant Development Limited (Canada)
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Central Vermont Railway, Inc.

Grand Trunk Western Railroad Company
Grand Trunk Corporation

Angelina & Neches River Railroad Co.
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Evans Products Company
NVF Incorporated
Sharon Steel Corporation

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Ford Motor Company
- American Road Equity Corporation
- The American Road Insurance Company
- American Road Services Company
- Cardinal Redevelopment Corporation
- Dearborn Capital Corporation
- Dearborn Marine, Inc.
- Detroit Downtown Development Corporation
- Environ, Inc.
- Eveleth Taconite Company
- Ford Aerospace & Communications Corporation
- Ford Aerospace Satellite Services Corporation
- Ford Asia-Pacific, Inc.
- Ford Auto Club, Inc.
- Ford Colorado Properties, Inc.
- Ford Communications, Inc.
- Ford Consumer Credit Company
- Ford Consumer Discount Company
- Ford Direct Markets, Incorporated
- Ford Electronics and Refrigeration Corporation
- Ford of Europe Incorporated
- Ford Export Corporation
- Ford Financial Services, Inc.
- Ford International Capital Corporation
- Ford International Finance Corporation
- Ford International Services Inc.
- Ford Leasing Development Company
- Ford Life Insurance Company
- Ford Microelectronics, Inc.
- Ford Motor Credit Company
- Ford Motor Credit Company International
- Ford Motor Credit Company of Iowa
- Ford Motor Dealership Facilities Company
- Ford Motor Land Development Corporation
- Ford Motor Properties, Inc.
- Ford Overseas Services Corporation
- Ford Products Company
- Fordson Coal Company

Ghia, Inc.
Greenfield Properties, Inc.
Humboldt Mining Company
Lincoln Motor Company, Inc.
Modular Concepts, Inc.
Parker Chemical Company
Parklane Insurance Company
Philco Finance Corporation
Predelivery Service Corporation
Renaissance Retail Shops, Inc.
Rouge Steel Company
Starnet Corporation
Sunglas Products, Inc.
The Dearborn Inn Company
3000 Schaefer Road Company
Vista Insurance Company
Vista Life Insurance Company
Vista Life Insurance Company of Texas
Ford Motor Argentina S.A.
Metalurgica Constitucion S.A.
Transax, S.A., Comercial, Industrial y Financiera
Plan Ovalo S.A. de Ahorro Para Fines Determinados
Ford Motor Company of Australia Limited
Ford Sales Company of Australia Limited
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company (Austria) K.G.
Ford Credit Bank A.G. (Austria)
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited
Ford Credit N.V.
Transcon Insurance Limited
Ford Brasil S.A.
Ford Industria e Comercio Ltda.
Distribuidora Ford de Titulos e Valores Mobiliarios Ltda.
Ford Distribuidora de Productos de Petroleo Ltda.
Ford Financiadora S.A. Credito, Financiamento e Inv.

Sao Francisco Maquinas e Ferramentas Ltda.
Bongotti S.A. Industria e Comercio de Radiadores
Ford Administracao e Consorcios Ltda.
Transglobal-Corretagem de Seguros Ltda.
Ford Motor Company Limited
Ford Property Company Limited
Ford Motor Credit Company Limited
Automotive Finance Limited
Ford Personal Import Export Ltd.
Ford Financial Trust Limited
Ford Motor Company of Canada, Limited
Ford Credit Canada Limited
Ford Glass Limited
Ensite Limited
Ford Electronics Manufacturing Corporation
Canadian Road Credit Company, Limited
Ford Motor de Colombia, S.A.
Ford Motor Company A/S
Ford Credit A/S
Ford Motor Company (Egypt) S.A.E.
Oy Ford Ab
Ford France S.A.
Credit Ford S.A.
Ford-Werke Aktiengesellschaft
Ford Credit Bank Aktiengesellschaft
Ford Versicherungs-Vermittlungs GabH
Ford Investitions-GmbH
Ford Investitions GmbH & Co oHG
Ford Versorgunge-und Unterstutzungseinrichtung GmbH
Saar-Industrie, GmbH
Ford Nederland B.V.
Ford (Canada) Netherlands B.V.
Ford Credit B.V.
Escorts Tractors Limited
Henry Ford & Son, Limited
Henry Ford and Son (Sales) Limited
Henry Ford & Son (Finance) Limited

Ford Italiana S.p.A.
Ford Credit S.p.A.
Ford Leasing S.p.A.
Ghia S.p.A.
Ford Motor Company (Japan) Ltd.
Ford Finance Company of Japan, Limited
Hokkai Ford Tractor Co., Ltd.
Ford Motor Company of Malaysia, Sdn. Bhd.
Associated Motor Industries Malaysia (AMIM)
Ford Motor Company S.A. de C.V.
Ford Motor Compania Comercial, S.A.
Ford Latin America, S.A. de C.V.
Ford Credit Overseas Finance N.V.
Ford Overseas Finance N.V.
Ford Motor Company of New Zealand Limited
Ford Motor Credit Company of New Zealand Limited
Ford Motor Norge A/S
Eik & Hausken A/S
Ford Motor Company del Peru
Ford Philippines Inc.
Ford Lusitana
Ford Motor Company Caribbean, Inc.
Ford Motor Company Private Limited
Ford Motor Company of South Africa (Proprietary) Ltd.
Ford Credit South Africa (Proprietary) Ltd.
Ford Espana S.A.
Ford Credit S.A.
Ford Leasing S.A.
Ford Motor Company Aktiebolag
Fords Vagnskadegaranti AB
Ford Credit A.B.
Ford Motor Company (Switzerland) S.A.
Ford Credit S.A.
Ford Lio Ho Motor Company Ltd.
Ford Enterprise Company Taiwan, Ltd.
Ford Motor Company (Thailand) Limited
Ford Uruguay S.A.

Ford Motor de Venezuela, S.A.
Productos Industriales, C.A.

Itel Rail Corporation
Itel Corporation
Green Bay and Western Railroad Company
Ahnapee and Western Railroad Co.
Hartford & Slocomb Railroad Co.
McCloud River Railroad Co.

International Paper Company
IP Timberlands, Limited

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No. 84-867 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF OF PETITIONER CONSOLIDATED RAIL CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-867

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER CONSOLIDATED RAIL CORPORATION

In a brief for respondent United States, the Solicitor General has supported Conrail's petition and the petition of the Interstate Commerce Commission ("Commission") in No. 84-550, both seeking review of the same decision of the court of appeals. Most of the remaining respondents have opposed both petitions. In this reply brief, we address those oppositions.[1]

I. Joint Rates

The question presented in Conrail's petition is whether the court of appeals properly added to the enumerated

[1] "Jt. Opp." refers to the brief in opposition filed by most respondents; "Can. Opp." refers to the brief in opposition filed by the Canadian railroads. "U.S. Br." refers to the Solicitor General's brief.

elements of the National Transportation Policy ("NTP") set forth in the Interstate Commerce Act ("ICA") an unprecedented requirement concerning "fairness" of divisions of joint rates. Respondents do not dispute that that question is important and merits review by this Court.[2] Nor do they deny that the decision below may be read as raising that question. They merely term such a reading of the court's decision "inhospitable," and contend that in any event the court was correct in adopting its reading over that of the Commission, the expert body charged with administration of the ICA (Jt. Opp. 17). They also attempt, through strained interpretations of the court's language, to minimize the scope and impact of its decision.

First, respondents' suggestion that the court did not purport to read the Act as embodying a policy concerning "fair divisions" that the Commission must apply in granting exemptions from ICA regulation (Jt. Opp. 17) is belied by the court's own language (*see* Conrail Pet. 12, 17-19; U.S. Br. 12-13, 17-19). Respondents claim that the court below merely "intended, not to add new elements to the transportation policy, but to give relevant content to the elements already there" (Jt. Opp. 17). However, whatever may have been the court's "intent" (a largely irrelevant issue), the clear effect of its decision is to add materially and substantially to the content of the NTP that the Commission must apply in considering exemptions or taking other actions under the ICA. More importantly, respondents' description of the court's

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[2] Respondents seek to diminish the effect of the decision below by asserting that it "affirmed the core" of the Commission's exemption, *i.e.*, as to maximum rate regulation (Jt. Opp. 2). However, the court's decision nullifies the exemption as to joint rates, which even respondents acknowledge govern "most" freight movements, *e.g.*, 70% as of 1980 (Jt. Opp. 2, 3).

role—"giv[ing] relevent content" to the NTP (Jt. Opp. 17)—confirms that the court's decision is at odds with this Court's decisions holding that to be primarily the function of the Commission, not a reviewing court (Conrail Pet. 19-20, 23; U.S. Br. 24).

Respondents next contend that the "broad statements of policy" enumerated in the NTP are "particularized in" and are "anchored in and illuminated by" the various other substantive provisions of the Act, or at least the Lee Amendment and perhaps other provisions "enacted concurrently with section 10101a" in the Staggers Rail Act amendments to the ICA in 1980; on that premise they conclude that in granting an exemption the Commission must consider not only the NTP, to which the exemption provision refers, but the policies and legislative history of each such provision of the ICA (Jt. Opp. 5, 17).[3] We disagree with that position, but believe that the issue it presents—how the ICA should be construed—is one of broad and continuing importance which merits this Court's attention.

Respondents further seek to minimize the effect of the decision below treating it not as imposing substantive requirements, but as involving only procedure, *i.e.*, by saying that it merely requires the Commission to consider and explain its conclusion about the effect of the exemp-

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[3] Respondents evidently contend that only provisions of the ICA enacted as part of the Staggers Act constitute relevant particularizations of the broad policies of the NTP that must be considered, although there is nothing in the Staggers Act nor its history to support such a preferred position for its provisions in contrast to provisions enacted prior to 1980 but not repealed by the Staggers Act. To the contrary, a few provisions were singled out by Congress for special protection in section 10505 itself (*e.g.*, those prohibiting "intermodal ownership" or "protect[ing] the interests of employees" (49 U.S.C. §§ 10505(e), (g)), without regard to whether they antedated the Staggers Act.

tion on the fairness of divisions (Jt. Opp. 17, 21). However, "[decisions] relying on substantive analysis have often been cloaked in quasi-procedural language,"[4] and that is plainly so here.

In making this argument respondents attempt to avoid the irreconcilable conflict in approach between the decision below and the Fifth Circuit's decision in *American Trucking Associations* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), primarily by asserting that Congress had specifically authorized the Commission to exempt TOFC/COFC rail service, but "made no similar determination with respect to boxcar service" (Jt. Opp. 21). This purported distinction misses the point. The relevant consideration is that the exemption at issue here involves joint rates, not that it involves boxcars, and Congress did make clear its intention that the Commission apply its exemption authority to joint rates (Conrail Pet. 7, citing 126 Cong. Rec. 28430 (1980); H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980)).

Respondents repeatedly suggest that the Commission's exemption was contrary to the judgment reached by Congress in the legislative "compromise" reflected in the Staggers Act with respect to joint rates (Jt. Opp. 4, 11-16, 20). But this contention misapprehends the nature of that compromise.

The Carter Administration broadly proposed total and unconditional deregulation of joint rates for all freight traffic, without regard to whether a carrier had market power; the Commission would have had no role to play in the regulation of joint rates and there would have been no mechanism for reimposing regulation if warranted by

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[4] Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 571 (1985).

after-the-fact review.[5] In the compromise, that approach was rejected. Instead, in section 10705a carriers were given a limited measure of new authority to take unilateral action concerning joint rates (through surcharge or cancellation), without regard to whether they have market power; the Lee amendment was a relatively narrow limitation upon the right to take such unilateral action.[6] Moreover, as we have noted (Conrail Pet. 7 n.7, 19 n.30), carriers retained their pre-Staggers Act rights to cancel joint rates under section 10705(e), which is not subject to the Lee Amendment, and under which the Commission has consistently been sanctioning cancellations where (as here) there is no market power, but only after "unnecessarily expensive and time consuming" proceedings (*see* Pet. App. 161a & n.23).[7]

In addition, Congress broadly authorized and directed the Commission to deregulate further by granting exemptions, subject to after-the-fact revocation or modification, and explicitly indicated that joint rates were a prime candidate for the exercise of the exemption authority (*see* Conrail Pet. 7). Thus, there is simply no inconsistency between the boxcar exemption and the action

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[5] *See, e.g., Hearings on the Railroad Deregulation Act of 1979 Before the Subcomm. on Surface Transportation of the Senate Comm. on Comerce, Science & Transportation*, 96th Cong., 1st Sess. 3-60, 253-54 (1979).

[6] Respondents do not dispute that the terms of the Lee Amendment itself do not address the "fairness" of divisions (*see* Conrail Pet. 19 n.30).

[7] Even if respondents' argument based on the Lee Amendment had merit, at most it would call into question the application of the exemption to section 10705a, but such a limitation on the scope of the exemption would have no meaning because even prior to the exemption that section had no practical effect (*see* Pet. App. 161a).

taken by Congress in the Staggers Act.[8] Rather, the exemption is consonant with and furthers the policy and direction of the Act.

Respondents characterize the statements in floor debate by Represenative Lee as having "unequivocally expressed the intent of the framers" of the exemption provision (Jt. Opp. 14), as having been "strongly endorsed" by Representative Madigan (*id.* at 16), and as having been treated by the Commission and the courts "as an authoritative expression of the Congressional purpose" concerning exemption of joint rates (*id.*). In fact, there is no indication that the Senate shared or was aware of those views or that the conferees endorsed them; Representative Madigan's "endorsement" was made three months before the Lee statement (126 Cong. Rec. 28430 (1980)); and, in the matters cited by respondents, the Commission and the court discussed the Lee statement only in the context of applying section 10705a, to which it directly relates. Neither even suggested that it bears on the Commission's exemption authority under section 10505.

In granting the boxcar exemption, the Commission concluded that the self interest of long haul carriers will militate against the closing of efficient routes involving short haul carriers. In attempting to support the court of appeals' conclusion that the Commission had not adequately considered the relevant policies concerning divisions in reaching that conclusion, respondents assert that

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[8] Respondents state that the exemption rests upon the same premise rejected by Congress in the Staggers Act, *i.e.*, "that continued joint rate regulation was not needed to protect smaller carriers, because the long-haul carriers 'will not act so imprudently as to drive profitable traffic away' " (Jt. Opp. 12). But rejection of a proposal, based on that premise, for broad, permanent deregulation of all joint rates without regard to the existence of market power or other limitations, is not tantamount to rejection of the premise as a basis for a more limited exemption satisfying the conditions of section 10505.

in an earlier decision the Commission had treated the issue of cancellation of joint rates at greater length and had made "contradictory findings" and reached the "opposite conclusion," citing *Traffic Protective Conditions*, 366 I.C.C. 112, 125-126 (1982), *rev'd on other grounds sub nom. Detroit T. & I. R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984) (Jt. Opp. 18-19). In fact, respondents have stood the Commission's decision in that proceeding on its head, for it is completely consistent with and was relied upon in the Commission's analysis here (*see* ICC Pet. 7 n.2 & Pet. App. 162a).[9]

II. Car Hire

Respondents also seek to minimize the importance of the question presented concerning the court of appeals' invalidation of the partial exemption as to car hire by

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[9] The issue was whether the Commission should remove certain conditions it had imposed in virtually all railroad mergers and consolidations since 1920 (the so-called "DT&I Conditions"), which regulated, *inter alia*, the relationship between the merging parties' joint rates involving other carriers and their merged single line rates. In the portion of the decision relied upon by respondents the Commission discussed two hypothetical situations (not "many" (Jt. Opp. 19)) in which railroads *might* not choose the more efficient joint line route. However, the Commission then dismissed the possibility as not being a substantial concern, concluding that "[i]n general * * * a railroad acting in an economically rational manner would be expected to favor more efficient, joint-line routes over less efficient single line-routes," and held that the two hypothetical exceptions "do not appear to support general application of the DT&I Conditions to ensure against loss of more efficient joint-line routes * * *." 366 I.C.C. at 126. The Commission's decision would have applied broadly to all carriers subject to DT&I Conditions without regard to the existence of market power or to type of commodity or movement, many of which might not qualify for exemption under the limitations of section 10505. Accordingly, the Commission's statement that "statutory protections are available to protect efficient joint-line routes" (*id.*) was in no way inconsistent with the later exemption of boxcar traffic where the conditions of section 10505 were satisfied.

stating that there is no significant dispute about the content of the applicable legal standard stated by the court (*i.e.*, "partial exemption must lead to '*decreased* regulation' "), but only as to the court's application of that standard to car hire regulation (Jt. Opp. 22). But such facile and unfounded characterization cannot obscure the importance of the issue, for the court's analytical approach threatens the viability of any partial exemption. This is so because any effort to narrow the scope of regulation, short of total exemption, can be characterized as resulting in "different," and hence "fresh" or "new," regulatory impacts or formats (Jt. Opp. 24, 25).

Respondents assert that the court's ruling is of no practical consequence in this case because of the Commission's authority to act under section 11122 concerning car hire (Jt. Opp. 22). However, they carefully qualify this contention by saying only that the Commission is free to "consider" adopting rules under section 11122 that would achieve the same result (*id.*), and they in fact contend that the Commission could not do so (*cf. id.* at 23-24); *see also* Can. Opp. 27-28).

Respondents do not dispute that the agency has discretion to determine which of its applicable statutory authorities to invoke. Instead, they seek to minimize this right by asserting that the decision below does not conflict with decisions of this Court and other courts of appeals giving great deference to the agency's decisions concerning its remedial authority, asserting that those cases did not involve a choice between two express remedial provisions (Can. Opp. 24-25 n.14; *cf.* Jt. Opp. 25). However, in *Chemical Manufacturers Association* v. *Natural Resources Defense Council, Inc.*, 53 U.S.L.W. 4193, 4197 (U.S. Feb. 27, 1985) (No. 83-1013), this Court held that when there is such a choice between two provisions there

is "a particularly persuasive case for deference to the Agency's interpretation." That conclusion applies *a fortiori* here, where the statute broadly provides that the powers of the Commission are supplementary in nature, not exclusive of one another (*see* Conrail Pet. 23).

III. Export Coal

Respondents assert that the Court should not review the court of appeals' decision in this case even if it agrees to review the same court's decision concerning the Commission's exemption as to shipment of coal for export (Jt. Opp. 25-26).[10] There are no doubt differences that could lead the Court to act one way in this case and another in that. However, the two cases do present analogous questions concerning the extent to which the Commission, in considering exemptions, must address policies or provisions of the ICA not set forth in the NTP, and in both cases the court of appeals invoked a judicially formulated notion of "fairness" to beneficiaries of existing regulation as the ground for invalidating a deregulatory exemption.[11] While the Court should grant certiorari in this case even if it does not review the export coal decision, if it does grant certiorari in the latter case it should certainly do so here.[12]

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[10] *See* petitions in *ICC* v. *Coal Exporters Ass'n*, No. 84-884, and *Norfolk & W. Ry.* v. *Coal Exporters Ass'n*, No. 84-885.

[11] In export coal the beneficiaries where primarily shippers of coal for export; here they are primarily owners or investors in boxcars seeking through concededly uneconomic regulation to protect a return no longer warranted by market demand.

[12] We note the inconsistency between the rationales of the supporters of the court of appeals' decisions in the two cases. Here, respondents contend that provisions of the ICA enacted in 1980 in the Staggers Act are protected against exemption (see p. 3 n.3, *supra*), while the respondents in that case argue that pre-1980 provisions not repealed in the Staggers Act are protected against exemption. (Brief For Respondents Coal Exporters Association and National Coal

CONCLUSION

The petitions of Conrail and the Commission for a writ of certiorari should be granted.

Respectfully submitted,

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April 1985

Association in No. 84-884, p. 19). Acceptance of both arguments would preclude any exemptions. Such a fundamental inconsistency demonstrates the dangers in going beyond the express provisions of the NTP as the criteria for exemptions and confirms the need for definitive guidance from this Court concerning the validity of the Commission's approach to its authority to grant exemptions.

SUPREME COURT OF THE UNITED STATES

INTERSTATE COMMERCE COMMISSION
84–550 *v.*
BRAE CORPORATION ET AL.

CONSOLIDATED RAIL CORPORATION
84–867 *v.*
AHNAPEE AND WESTERN RAILWAY COMPANY ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84–550 AND 84–867. Decided April 29, 1985

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.*, Congress took a significant step away from the traditionally pervasive federal regulation of railroads. Displaying evident distrust of the regulatory model, the Act includes a 15-point National Rail Transportation Policy. § 10101a. Among the policies identified are "(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; [and] (2) to minimize the need for Federal regulatory control over the rail transportation system." *Ibid.* The Act also provides that the Interstate Commerce Commission (ICC) "shall exempt" persons or transactions from an otherwise applicable regulation if the regulation "is not necessary to carry out the transportation policy of section 10101a" and "either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." § 10505(a).

These cases arise out of an ICC rulemaking regarding the deregulation of boxcar traffic. 367 I. C. C. 423 (1983); *id.*, at 745. The Commission granted far-reaching exemptions pursuant to § 10505(a). First, it eliminated ceilings on boxcar rates. Particularly in light of economic pressures caused by competition from the trucking industry, the Commission found that rail carriers lacked market power and that regulation of boxcar rates was not necessary to further the National Rail Transportation Policy. Second, it extended this exemption to "joint rates." A joint rate is the charge to a shipper for transportation over connected lines by more than one carrier. The revenues are divided among the carriers pursuant to joint rate agreements, which are regulated by 49 U. S. C. § 10705. The Commission concluded that elimination of joint rate regulation would not lead to the demise of joint rates, long haul routes, or cooperation between large and small carriers. Third, the Commission exempted negotiated agreements from its "car hire rules." Under the otherwise applicable rules, the owner of a boxcar could charge a per diem rental fee to the railroad with control over the boxcar for the entire time the car was on that railroad's tracks, even if it was empty and still. The Commission found that in practice these rules resulted in extreme inefficiency, higher operating costs, an incentive for excessive purchases of boxcars, and a lack of responsiveness to market conditions.

Respondents sought judicial review in the Court of Appeals for the District of Columbia Circuit. The court sustained the exemption of boxcar traffic from maximum rate regulation, but set aside the other two rulings. 740 F. 2d 1023 (1984). With regard to the joint rate exemption, it found that the Commission's consideration of the need for regulation and the possible adverse consequences of its elimination had been inadequate. Noting congressional concern about the possibility of large carriers squeezing profits from captive small carriers, it held the Commission's failure to consider the effect of joint rate exemption on the fair division of

joint rate revenue among carriers had been arbitrary and capricious. Turning to the car hire issue, the Court of Appeals, echoing the position of dissenting ICC Chairman Taylor, held that the Commission's decision was, in reality, not an exemption but a new regulation. As such, it exceeded the Commission's authority under § 10505. That section was part and parcel of the Act's emphasis on the reduction of regulatory burdens and government oversight. The joint rate "exemption," rather than leaving the contours of the car hire relationships to the market, skewed the initial economic relationship in favor of the destination carrier. This reregulation could only be accomplished pursuant to normal rulemaking procedures.

Consolidated Rail Corp., which had initially sought the rulemaking, and the Commission itself now seek review in this Court. They are supported by a brief from the United States. Several aspects of the decision below are questionable. The court's concern with the fair division of revenues between carriers is not squarely based on the statutory language, which requires only that the regulation from which an exemption is granted be "not needed to protect *shippers* from the abuse of market power." § 10505(a)(2)(B) (emphasis added). There is also an arguable inconsistency between upholding the Commission with regard to maximum rate regulation generally and affirming its view of the surrounding circumstances supporting such a ruling, while refusing to do so as to joint rates. Finally, the court's distinction between re- and de-regulation is hard to pin down—on its face, the Commission's ruling is certainly the latter.

More generally, the fact that the battle between the court and the agency has taken place on what may be considered the latter's turf casts doubt on the decision below. It is the Commission that should be evaluating the nature of the rail transportation market and the effect and necessity of regulation.

Finally, this case presents a significant clash between an independent federal agency and a Federal Court of Appeals. The subject matter is important not only to the numerous parties but to the Nation as a whole. This case seems to be one episode of a larger struggle. See *Interstate Commerce Commission* v. *Coal Exporters Assn. of the United States, Inc.*, *post*, at ——. The court and the agency have rather divergent views of the mandate of the Staggers Act and the nature of the Commission's task thereunder. The proper implementation of that important legislation requires that these larger issues be settled.

I would grant these petitions and consolidate them for oral argument.

JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.